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**COTENANCY**

**AND**

**PARTITION.**



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# COTENANCY

AND

## PARTITION:

A TREATISE ON THE LAW OF CO-OWNERSHIP AS IT EXISTS  
INDEPENDENT OF PARTNERSHIP RELATIONS  
BETWEEN THE CO-OWNERS.

By A. C. FREEMAN,

AUTHOR OF THE LAW OF JUDGMENTS.

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# COTENANCY.



## CHAPTER I.

### INTRODUCTORY.

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§ 1. **General Classification of Property.**—Classified with reference to the number of its owners, property is said to be either general or particular. It is general when held by a body of men to the exclusion of all other men or bodies of men; and particular when held by one individual to the exclusion of all other individuals. Those who suppose that property had its inception in a common recognition of rights based upon the fact of occupancy, assert that general property originated in the settlement and occupation of some large area of land by a number of men united into one collective body. By such common act of occupancy, the whole tract became the joint property of its occupants. As such, it was subject to the common dominion of every individual of the whole collective body—a dominion which could not, as to any single parcel, be rightfully exercised by any member of the community to the exclusion of any other member; but which could, nevertheless, as to every part of the whole tract, be rightfully asserted by every member to the total exclusion of all persons not belonging to the community.<sup>1</sup> The body thus appropriating to itself some previously uninhabited territory was no doubt more numerous than the cotenants

<sup>1</sup> Rutherford's Institutes, 82.



of single estates ordinarily are at the present day. But the *general* property created by this appropriation bears a strong resemblance to a cotenancy, in the relative rights which it assured to the several occupants, and in the fact that each occupant had rights in every part of the whole domain equal to every other occupant, and superior to all persons not joining with him in the original occupation.

§ 2. Co-ownership adapted to all forms of Civilization. There is nothing which so generally strikes the imagination and engages the affections of mankind as the right of property, or that sole and despotic dominion which one man claims and exercises over the external things of the world in total exclusion of any other individual in the universe.<sup>1</sup> No doubt, this love of "sole dominion" has increased as the number of occupants of the earth has been augmented. At first, the inhabitants were few, their tastes simple, and their desires easily gratified out of the abundant products of the earth. The fruits of the earth could be treated as the general property of all, and the special property of none. Lands for occupation and for the sustenance of flocks and herds were more than sufficient to accommodate the necessities of all, and no one had any occasion to segregate to himself a tract for his exclusive use. When this state of things no longer existed, it is not probable that a several or exclusive ownership at once succeeded it. A dominion or ownership by families, or by other relatives or associates, probably preceded the existence of exclusive appropriations, and answered the necessities of men long after the idea of property began to develop itself. But if co-ownership originated at some stage of the world's history, *after* a community of rights ceased to be practicable, and *before* the love of *sole* dominion became the strong passion described by Blackstone, it was nevertheless not destined to be completely superseded by ownership in severalty. The properties and advantages of co-ownership are such as to connect it inseparably with the highest as well as with the lowest forms of civilization. It commended itself to the lowest forms, as we have seen,

<sup>1</sup> 2 Bl. Comm. 2.

because it was suited to the wants of a people who considered property as belonging to families or clans, rather than to individuals. To the highest forms it is equally welcome, because it admits, to a considerable extent, of that aggregation of capital by which several persons, each of small means, are enabled to exercise the power and obtain the influence of wealth. Aside from the perpetuation of co-ownership on account of the advantages offered by it to a union of capital, estates in severalty are constantly turned into undivided estates by the operation of laws regulating the transmission of property by descent.

§ 3. **The Subject and Scope of this Book.**—By the Common as by the Civil Law, whenever the same thing becomes the property of two or more, there are formed between them divers “engagements by the bare effect of their interest in the thing that is common to them.”<sup>1</sup> Aside from the engagements thus formed between the common owners, other engagements are formed between them and third persons by which the respective rights and obligations of the common owners and such third persons are defined and enforced. The engagements here referred to are such as flow from the mere relation of co-ownership; and may be limited or extended by contracts entered into between the co-owners. The co-owners may obtain rights and assume obligations, both between themselves and as to third persons, by an infinite variety of agreements removing their property partly or wholly from the law of cotenancy and subjecting it to the law applicable to some new and different business relation. The most familiar instance of this is in the formation of a copartnership. In this instance, the property of the firm, though jointly owned, is not subject to the law of joint ownership, but to that of copartnership. And where several co-owners form themselves into a corporate body and turn their joint property into corporate assets, this property henceforth, during its continuance in the corporation, is held in severalty by an artificial body, and is no longer subject to the law of co-ownership. Of the various purposes to which co-owners

<sup>1</sup> Domat's Civil Law, Part I., Book II., Tit. 5. Sec. 1, Art. 5.

may devote their property, and the various engagements which in law may attach to it in consequence of such devotion, it is not our intention to treat. This book is an attempt to state the law of co-ownership existing by reason of such ownership, independent of the relation of copartnership and of all other relations and agreements entered into by the parties for the purpose of creating rights or imposing obligations not otherwise attached to their cotenancy.

§ 4. **Plan of the Work.**—In treating of the law of co-ownership, we shall consider, 1st, the several kinds of cotenancy, the rules of law peculiar to each, and the tests by which each may be distinguished from the others; 2d, that portion of the law upon this subject having a general applicability to the various forms of co-ownership, and embracing the following subjects: conveyances and leases by cotenants; ouster of one cotenant by another; the relations, rights, and liabilities of cotenants between one another; the legal and equitable remedies by which those rights may be secured and those liabilities enforced; the rights and liabilities of cotenants as against third persons, and the legal and equitable remedies which may be employed by and against cotenants; 3d, the means by which a cotenancy may be changed into one or more estates in severalty, including all the various forms of severance and partition.

§ 5. **English Tenures.**—All land in England, excepting Crown land, not tenanted, “was supposed to be holden of some superior lord, by and in consideration of certain services to be rendered to the lord or possessor of this property. The thing holden is therefore styled a *tenement*, the possessors thereof *tenants*, and the manner of their holding a *tenure*.”<sup>1</sup> The tenure by which the lands in England were held was “a branch of the feudal system, established by the Germans in many of the Roman provinces on the decline of the Empire. By the theory of that system, the whole of a territory which the Germans conquered, immediately became, in a qualified manner, the property of their general, who was intrusted with

<sup>1</sup> 2 Bl. Comm. 59; 1 Greenl. Cruise, 23.

the important prerogative to divide the land as he pleased amongst himself and followers. In effect, the parting of the land reached two objects: it rewarded the soldiers for their past, and beforehand gave them the wages of their future service; yet, in theoretical strictness, the latter alone was the object of a feudal gift. The chief gave, and the soldier took, the land for *future* service. A gift of this kind created a tenancy. The soldier took the land to hold to his chief as landlord, and thus became his tenant. To strengthen the bond between them, and establish the relative duties of lord and tenant, the tenant afterwards bound himself by an oath to do the prescribed services of the feud, and to be true to his lord for the land he held of him. In the same way, the tenants became the lords of others, by again parting their lands to be held of themselves by feudal services; and thus a chain of subordinate and connected landed interests was made to depend from the head of the community, and to extend to a great proportion of the subjects."<sup>1</sup>

§ 6. **American Tenures.**—In England, the original acquisition of title to lands was by *conquest*; in America, it was by *discovery*. All the European nations that ever obtained a footing upon American soil recognized the right of discovery, as entitling the sovereignty by whose subjects the discovery was made to an absolute dominion and ownership over the lands discovered. By virtue of this right, the Crown of England was invested with the title to most of the lands within the present boundaries of the United States.<sup>2</sup> "It is now a settled and fundamental doctrine, that all valid individual title to land within the United States is derived from the grant of our own local governments, or from that of the United States, or from the Crown, or the royal chartered provincial governments. This great feudal principle, that all lands are held of the sovereign, being thus acknowledged, the remark of Lord Coke seems in strictness to apply as justly to the United States as to England, we having no lands which are properly allodial, that is, which are not holden."<sup>3</sup>

<sup>1</sup> Ram. on Tenure and Tenancy, 1, 2.

<sup>2</sup> Johnson v. McIntosh, 8 Wheat., 543.

<sup>3</sup> 1 Greenl. Cruise, note to p. 19; 3 Kent's Comm. 878; Jackson v. Ingraham, 4 Johns. 163; DeArmas v. Mayor of N. Orleans, 5 La. R. 132; Jackson v. Waters, 12 Johns. 365.

But in some of the United States, statutes have been enacted declaring all their lands allodial. By these declarations, it is probable, nothing was meant to be affirmed except that the lands were to be "free from all feudal burdens and exactions, except those due to the State, and not as intended to change any of the established rules of acquiring and transmitting real property."<sup>1</sup> But in none of the States is there anything beyond a mere theoretical holding from a superior sovereignty. Practically, all lands are held by allodial title. Real estate, as much as personal property, is the subject of absolute ownership. It is not therefore a very accurate use of language to characterize the several persons who together *own* a thing as "tenants," nor their estate as a "tenancy." But the language of the common law has been so uniformly adopted in this country, both by judges and text-book writers, that we shall follow their example, and hereafter designate the several kinds of co-ownership by the same terms by which they are known in the common law; and shall use the term cotenancy to indicate the ownership of property by two or more in undivided interests.

§ 7. **Classification of Tenancies.**—The most approved writers upon the common law assert that, with respect to the number and connection of their owners, lands and tenements may be held *in four different* ways, namely, in severalty, in joint tenancy, in coparcenary, and in common.<sup>2</sup> This classification ignores a tenancy which is treated at length in all the commentaries on the common law, and which still exists in England and in nearly all the United States, namely, tenancy by entireties. In the progress of this work, we shall have occasion to treat of still another species of co-ownership, one adopted in Lower Canada and in a few of the States of the American Union, namely, the *Communio Bonorum*, or community of property between husband and wife.

§ 8. **Mixed, Imperfect, and Redundant Tenancies.**—It must not be inferred from what has been said, that every

<sup>1</sup> Note to p. 19 vol. 1 Greenl. Cruise.

<sup>2</sup> 2 Bl. Comm., 179; 2 Greenl. Cruise, 351.

tract of land not held in severalty must therefore be subject to but one of the several cotenancies already named. It may be held by a *mixed cotenancy*, in which may be united all the common law cotenancies. Thus, if an estate be granted to A, B, and C and wife, it vests in them as joint-tenants—A having one moiety, B another, and C and wife the other. But as between C and his wife, their moiety is by them held as tenants by entireties. If, however, A should convey his moiety to D, then the estate would be held as follows: by D as a tenant in common, by B as a joint-tenant, and by C and wife as tenants by entireties. So lands conveyed to a husband and wife may be the separate property of the husband so far as his separate estate contributed to their purchase, the separate property of the wife to the extent of the funds furnished by her, and the common property of both so far as they were paid for out of the community assets. A cotenancy may also be either *imperfect* or *redundant*: imperfect when it exists without some of the incidents usually connected with like tenancies, as in case of a joint-tenancy without the right of survivorship;<sup>1</sup> redundant when it possesses some attribute not ordinarily possessed by like tenancies, as in case of a tenancy in common to which the right of survivorship is attached.<sup>2</sup>

<sup>1</sup> Doe v. Abey, 1 Maule & S., 428.

<sup>2</sup> Shanks v. Chambliss, Walker, Miss., 249.

## **CHAPTER II.**

### **JOINT-TENANCY.**

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§ 9. **Definitions by Littleton and Blackstone.**—The distinguishing characteristics of an estate in joint-tenancy are, no doubt, well understood; but, if we may judge from frequent attempts resulting in failures of like frequency, great difficulty has been experienced in embodying those characteristics in any single definition. Both Littleton and Blackstone content themselves by giving an instance or illustration of this estate. Neither attempts any precise or formal definition. The former says: “Joyntenants are, as if a man be seized of certaine lands or tenements, &c., and enfeofeth two, three, or four, or more, to have and to hold to them for terme of there lives, or for terme of another’s life, by force of which feoffment or lease they are seized, these are joyntenants.”<sup>1</sup> According to Blackstone, “An estate in joint tenancy is where lands or tenements are granted to two or more persons to hold in fee-simple, fee-tail, for life, for years, or at will.”<sup>2</sup> Each of these illustrations shows rather how a joint-tenancy may be created, than what its peculiar incidents are after its creation. The words of Littleton may be misprinted.<sup>3</sup> If not, his definition is more objectionable than Blackstone’s, because it involves the idea that joint-tenancies cannot be of estates in fee, but are confined to estates for life. Both illustrations are alike faulty in implying that a joint-tenancy must necessarily be created by a feoffment or grant, and that it does not include personal property. They are also liable to the further objection of assuming that a grant to two or more is the chief feature of joint-tenancy, whereas a tenancy by entirety was also created by a grant to two (they being husband and wife); and a tenancy in common arose from a grant to two or more, when the grantor inserted words indicating an intent to create a several instead of a joint estate. Mr. Cruise, in treating of joint-tenancy, avoids this last objection when he states that “where lands are *granted to two or more persons*, to hold to them and their heirs, or for term of their lives, or for term of another’s life, *without any restrictive, exclusive, or explanatory words*, all the persons named in such instrument

<sup>1</sup> Litt. sec. 277.<sup>2</sup> 2 Bl. Comm. 180.<sup>3</sup> See note Co. Litt. 180 a.



to whom the lands are so given, take a *joint estate*, and are called joint-tenants."<sup>1</sup>

§ 10. **Definitions by Kent and Preston.**—"Joint-tenants," according to the definition of Chancellor Kent, "are persons who own lands by a joint title, created expressly by one and the same deed or will. They hold uniformly by purchase."<sup>2</sup> This definition has the vice of implying that joint-tenancy does not apply to chattels, and that it could not exist in title by prescription. A better definition than either of those heretofore alluded to is that of Mr. Preston, viz., "Joint-tenancy is when several persons have any subject of property jointly between them, in equal shares, by purchase."<sup>3</sup> This definition, as well as that of Chancellor Kent, is too broad, in this, that it embraces tenancy by entireties, as well as joint-tenancy.<sup>4</sup> It is doubtful, too, whether joint-tenants necessarily hold in equal shares. Thus, if A, B and C be joint-tenants, and C alienate one-half of his moiety to D, A, B and C remain joint-tenants, though the interest of C is no longer equal to that of A or B. Perhaps, however, after such alienation, the estate would be held as follows: one-half by A, B and C as joint-tenants; one-third by A and B as joint-tenants; and one-sixth by D as a tenant in common. Viewed in this light, the alienation would create two joint-tenancies, in one of which the interests of the cotenants A and B would be equal, and in the other the interests of the cotenants A, B and C would also be equal; and thus the correctness of this feature of Mr. Preston's definition would be established. If this definition were modified so as to exclude tenancies by entireties, and by inserting two or more in the place of "several," we should feel inclined to accept it as correct. It would then stand as follows: "Joint-tenancy is when two or more persons, not being husband and wife at the date of its acquisition, have any subject of property jointly between them in equal shares by purchase."

<sup>1</sup> 2 Greenl. Cruise, 364.

<sup>2</sup> 4 Kent's Comm. 357.

<sup>3</sup> 1 Preston on Estates, 186.

<sup>4</sup> For discussion of difference between joint tenancy and tenancy by entireties, see §§ 64 and 71.

§ 11. **Properties of a Joint-Tenancy.**—“The properties of a joint estate are derived from its unity, which is fourfold: the unity of *interest*, the unity of *title*, the unity of *time*, and the unity of *possession*; or, in other words, joint-tenants have one and the same interest, accruing by one and the same conveyance, commencing at one and the same time, and held by one and the same undivided possession.”<sup>1</sup> All these properties usually belong to a joint-tenancy, but it must not be inferred that all are indispensable. Joint-tenants may have different estates. Thus, two persons may have an estate in joint-tenancy for their lives, and yet have several inheritances; and a fee may be limited by the same conveyance to two persons and to the heirs of one of them.<sup>2</sup> Lord Coke says: “If a rent-charge be granted to A and B, to have and to hold to them two, viz., to A untill he be married, and to B untill he be advanced to a benefice, they be joyntenants in the meantime, notwithstanding the severall limitations.”<sup>3</sup> So there are exceptions to the rule that joint-tenants must acquire their estates at one and the same time. This rule “does not apply to the learning of uses and executory devises.” Thus, a man may make a feoffment in fee to the use of himself and such wife as he shall afterwards marry, for their joint lives. In case of his subsequent marriage, he and his wife, though they come to their estates at different times, will hold as joint-tenants. So a devise or limitation to the use of the children of A, will give each child an estate as soon as born, and yet all will hold as joint-tenants.<sup>4</sup> And, according to the opinion of Lord Thurlow, whether a settlement be considered as a conveyance of a legal estate, or as a deed to uses, the vesting at different times would not necessarily prevent the estate from being held in joint-tenancy.<sup>5</sup> This opinion must

<sup>1</sup> 2 Bl. Comm. 180; 4 Dane's Ab. 758.

<sup>2</sup> For instances of joint-tenants having different estates, see 4 Kent Comm. 357; note to 2 Bl. Comm. 181; Co. Litt. 184 a; Cray v. Willis, 2 P. Wms. 590; Cook v. Cook, 2 Vern. 545.

<sup>3</sup> Co. Litt. 180 b.

<sup>4</sup> On this subject generally, consult 4 Kent Comm. 358; Schouler on Personal Property, 192.

<sup>5</sup> Stratton v. Best, 2 Bro. 240. A testator devised a tract of land to his brother's two eldest sons, “*in case of their coming to Canada and claiming the same.*” The Court held that each devisee had his entire lifetime in which to come and claim his estate; that if they came separately, their estates must vest in them at different dates,

not be received as undoubted law.<sup>1</sup> But there seems to be no exception to the rule that the title of joint-tenants must arise from *one* act, deed, or devise.

§ 12. **Survivorship.**—But the grand incident of joint estates is the doctrine of *survivorship*, “by which, when two or more persons are seized of a joint estate, for their own lives, or *pur auter vie*, or are jointly possessed of any chattel interest, the entire tenancy upon the decease of any of them remains to the survivors, and at length to the last survivor; and he shall be entitled to the whole estate, whatever it may be.”<sup>2</sup> This right of survivorship arises when one of the tenants suffers a civil, as well as when he undergoes a physical death.<sup>3</sup> But two may be joint-tenants without both having equal benefit of survivorship: “As if a man letteth lands to A and B during the life of A; if B dyeth, A shall have all by the survivor, but if A dyeth, B shall have nothing.”<sup>3</sup> So there may be tenancies with the incident of survivorship; but, in other respects, possessing none of the characteristics of a joint-tenancy. Thus, where property was devised by a testator to his three sisters “for and during their joint natural lives, and the natural life of the survivor, to take as tenants in common, and not as joint-tenants,” these words were construed so as to create a tenancy in common, with the incident of survivorship.<sup>4</sup> The word “survivor” and the words “to the survivor” have often been used in devises, in connection, however, with other words indicating an intention that the devisees should not take a joint estate. In such cases, the Courts have uniformly interpreted the intention of the testator to be that the estate devised should vest in all the de-

but that, nevertheless, “they might still be joint-tenants; for it is allowed that the estates of joint-tenants may have a different commencement.” (Doe, on dem. of *McGillis v. McGillivray*, 9 Q. B., Upper Canada, 9.) Deed to O. R. and her children vests title in her children as *joint-tenants as they are born*. (*Powell v. Powell*, 5 Bush, Ky., 619.) In case of devises, there can be no doubt that the vesting of the estate in the several devisees at different times does not prevent them from holding as joint-tenants. (*McGregor v. McGregor*, 1 De G. F. & J. 68; *Kenworthy v. Ward*, 11 Hare, 196; *Hand v. North*, 33 Law J. Rep., N. S., Ch. 556.

<sup>1</sup> *Woodgate v. Unwin*, 4 Sim. 129; *McPherson v. Snowden*, 19 Md. 230.

<sup>2</sup> 2 Bl. Comm. 184.

<sup>3</sup> Co. Litt. 181 b.

<sup>4</sup> *Doe v. Abey*, 1 Maule & S. 428.

visees *surviving when the devise took effect*, to be by them thereafter held as tenants in common.<sup>1</sup>

§ 13. **Survivorship in Equity.**—Expressions may be found in the reports indicating that survivorship is abhorred in equity.<sup>2</sup> However this may be, it is quite certain that few, if any, instances can be discovered where this abhorrence has led to any withholding of the rights of the survivor. Equity in this respect, as in others, follows the law. If there be a doubt whether an estate was, at its creation, a joint-tenancy or a tenancy in common; or if, conceding the estate to have been a joint tenancy at its creation, there be a doubt whether there has not been a subsequent severance of the jointure—in all such cases, equity will resolve the doubt in favor of tenancy in common.<sup>3</sup> But if, on the other hand, the facts shown in a court of equity, are such as would clearly induce the presumption of a joint-tenancy, if shown in a court of law, and there is nothing to indicate that such tenancy has been severed by the parties thereto, then, in equity as in law, the right of survivorship, as well as all other rights arising out of the joint-tenancy, will be recognized and protected.<sup>4</sup> It is unnatural that a man should desire to hold his property by such a tenure that, in the event of his death, his heirs should have no interest in his estate; but still, if any man give evidence of such a desire by accepting and retaining a joint estate, there is no reason why a court of equity should, after his decease, refuse to recognize the rights growing out of the relation which he had thus voluntarily assumed and retained. It should also be remembered that each joint-tenant has, by the operation of the law of survivorship, an equal chance with his cotenant of succeeding to the entire estate. Survivorship has, perhaps, never been more ably defended than by the Master of the

<sup>1</sup> *Rose v. Hill*, 3 Burr. 1881; *Hawes v. Hawes*, 1 Wils. 166; *Shanks v. Chambliss, Walker*, 249; *Keating v. Cassells*, 24 Q. B. (Upper Canada) 314; *Jones v. Hall*, 16 Sim. 500.

<sup>2</sup> *York v. Stone*, 1 Salk. 158.

<sup>3</sup> *Barclay v. Hendrick's Heirs*, 3 Dana, 880; *Barker v. Giles*, 2 P. Wms. 281.

<sup>4</sup> *Aveling v. Knipe*, 19 Ves. 441; *Stuart v. Bruce*, 3 Ves. 632; *Acton v. Smallman*, 2 Vern. 556; *Barclay v. Hendrick's Heirs*, 3 Dana, 378; *Bone v. Pollard*, 24 Beav. 283.

Rolls when, in the case of *Cray v. Williams*,<sup>1</sup> he said: "Neither is there anything unreasonable or unequal in the law of joint-tenancy, each having an equal chance to survive; and the duration of all lives being uncertain, if either party has an ill opinion of his own life, he may sever the joint-tenancy by a deed granting over a moiety in trust for himself; so that survivorship can be no hardship where either side may, at pleasure, prevent it."

§ 14. **Survivorship is Paramount to Dower and Curtesy, and to Rights of Devisees.**—At the death of a joint-tenant, his cotenants are instantly seized of the whole estate. Neither the heirs, nor any other persons claiming under the deceased cotenant, have any claim to his former interest in the estate, unless there has been some act of severance sufficient to change the nature of the tenancy and to subvert the whole right of survivorship. "The mere possibility of the estate being defeated by survivorship prevents the wife from having any dower."<sup>2</sup> The reason for this is, "for that the jointenant, which surviveth, claimeth the land by feoffment, and by survivorshippe, which is above the title of dower."<sup>3</sup> Dower in the lands of joint-tenants is, in Mississippi, allowed by statute.<sup>4</sup> The same reasons which exclude the wife of a joint-tenant from her right to dower, prevent the husband of a joint-tenant from taking any interest in the lands of his deceased wife as tenant by curtesy,<sup>5</sup> though during their coverture he has the right to use and occupy such lands as tenant by marital right.<sup>6</sup> So a devise made by a joint-tenant, as there is no estate after his death to operate upon, has no effect.<sup>7</sup> But it seems that the decisions go further, and declare such a devise void, though the testator before his decease, but subsequent to the devise, acquired a devisable interest, as where the lands, when devised, are held in joint-tenancy, and are thereafter set off to the testator in severalty.

<sup>1</sup> 2 P. Wms. 529.

<sup>2</sup> *Mayburry v. Brien*, 15 Pet. 37; 5 Bac. Ab. 240.

<sup>3</sup> Co. Litt. 37 b; Litt. sec. 45.

<sup>4</sup> *James v. Rowan*, 6 S. & M. 393.

<sup>5</sup> *Chitty on Descents*, 323; *Bell on Husband and Wife*, 157.

<sup>6</sup> *Bishop v. Blair*, 36 Ala. 80.

<sup>7</sup> *Duncan v. Forrer*, 6 Binn. 197; *Powell on Devises*, 116; Litt. sec. 287.

The reasons given for holding the devise inoperative, even in such a case, were that it could only take effect as a severance, which it was not; that the estate to pass by devise must be of the same character as it was when devised; and that the changing of the estate from joint to several, so far from assisting the devisee, was a revocation of the devise.<sup>1</sup>

§ 15. **Who may be Joint-Tenants.**—In a preceding section, a quotation was made from Lord Coke's comments upon Littleton, in which his Lordship asserts that there may be a joint-tenancy without equal benefit of survivorship, or with such benefit exclusively in favor of one of the tenants.<sup>2</sup> Notwithstanding this general principle, inequality in survivorship has been suggested as the reason for the rule that there can be no joint-tenancy between a corporation and a natural person; and the impossibility of survivorship has also been urged as a conclusive ground for denying the right of two corporate bodies to hold between them a joint estate. In the case of corporations, it is further asserted that they cannot hold jointly because they are seized by different rights and in different capacities. But upon whatever reasons founded, the rule is established, beyond doubt, that "*bodies politic or corporate* cannot be joint-tenants with each other; nor can the king, or a corporation, *whether sole or aggregate*, be joint-tenant with a natural person;"<sup>3</sup> but "all natural persons may be joint-tenants."<sup>4</sup>

§ 16. **What may be held in Joint-Tenancy.**—No species of property is incapable of being held by a joint title. Whatever may be subject to individual dominion by virtue of the law of sole ownership, is likewise susceptible of being made subject to such joint dominion as results from the law of *joint* ownership. Thus, considered in regard to the quantity of interest which the joint-tenants have, their estate may

<sup>1</sup> Swift v. Roberts, Amb. 617; S. C. 3 Burr, 1488; 1 Blackst. 476.

<sup>2</sup> See § 12.

<sup>3</sup> Co. Litt. 190 a; 2 Greenl. Cruise, 372; Telfair v. Howe, 3 Rich. Eq. 242; De Witt v. San Francisco, 2 Cal. 297; Lyster v. Kirkpatrick, 26 Q. B. (Upper Canada) 217.

<sup>4</sup> 2 Greenl. Cruise, 372.

be in fee-simple, fee-tail, for life,<sup>1</sup> for years,<sup>2</sup> or at will. It may be for life, or for the life of another.<sup>3</sup> The estate may be equitable as well as legal.<sup>4</sup> It may be undivided as well as in severalty. Hence, if there be three persons holding as joint-tenants, and one convey his interest to a third person, the other two will remain joint-tenants between each other, though their title is for only two-thirds of the estate. So joint-tenants may hold every species of personal estate, including funds in which they have jointly invested,<sup>5</sup> and also all kinds of chattels, debts, duties, contracts, and choses in action.<sup>6</sup> In regard to mortgages, the rule seems to be, that whenever the mortgage is made to two or more to secure a joint debt, they will be treated as joint-tenants during the existence of the mortgage, and will be compelled to pursue their remedy of foreclosure by *joint* action.<sup>7</sup> But if, on the other hand, the debts secured are the several debts of the mortgagees, this fact rebuts the presumption of joint ownership in the mortgage, and leaves each at liberty to pursue his several remedy for the collection of the amount due to him individually.<sup>8</sup> In fact, the decisions holding joint-mortgagees to be joint-tenants, do not seem to carry the rule beyond allowing, or perhaps requiring, the *survivor*, in case of the death of either party, to prosecute the proceedings for foreclosure. The loan of the money for which a mortgage is given is not regarded as a transaction which would ordinarily raise the presumption that the parties thereby intended to create a joint ownership in the thing lent, with the benefit of survivorship. The surviving mortgagee is therefore, at least in equity, treated as trustee of the representatives of his deceased co-mortgagee.<sup>9</sup> If the loan of the money does not

<sup>1</sup> 2 Bl. Comm. 180.

<sup>2</sup> 1 Platt on Leases, 537; Sym's Case, Oro. Eliz. 88; Brundel's Case, 5 Co. 9-a; Jeffereys v. Small, 1 Vern. 217.

<sup>3</sup> Elliot v. Jekyl, 2 Ves. Sr. 681.

<sup>4</sup> York v. Stone, 1 Salk. 158; Rex v. Williams, Bunb. 343; Jickling on the Analogy between Legal and Equitable Estates, 233.

<sup>5</sup> Crossfield v. Such, 22 Eng. L. & E. 555; 8 Exch. 825; 22 Law J. Rep. Exch. 325.

<sup>6</sup> Trammell v. Harrell, 4 Ark. 602; Sessions v. Peay, 19 Ark. 269; Litt. secs. 281 and 282.

<sup>7</sup> Appleton v. Boyd, 7 Mass. 181; Williams v. Hilton, 35 Me. 547.

<sup>8</sup> Brown v. Bates, 55 Me. 522; Burnett v. Pratt, 22 Pick. 558.

<sup>9</sup> Story Eq. Jur. sec. 1206; Randall v. Phillips, 8 Mason C. C. 387; Petty v. Styward, 1 Ch. Rep. 31, 57.



imply an intention on the part of the mortgagees to give each other the benefit of survivorship, then no such intention should be inferred from any means which they may jointly pursue to render their security productive. Hence, if they jointly prosecute their remedy by foreclosure, and become joint purchasers at the sale, still will the interest acquired by such sale be held by tenancy in common.<sup>1</sup> And a like result follows when, independent of any foreclosure, they purchase the mortgagor's equity of redemption.<sup>2</sup>

§ 17. A joint-tenancy may be created by any joint purchase, but not otherwise. "Purchase includes every mode of coming to an estate except inheritance."<sup>3</sup> If two or more disseize another of "any lands or tenements to their own use, then the disseizors are joyntenants."<sup>4</sup> "Now, as there be joyntenants by disseizin, so are there joyntenants by abatement, intrusion, and usurpation, all of which are included in the latter."<sup>5</sup>

§ 18. Presumption in regard to Creation of.—As joint-tenancy was a favorite of the common law,<sup>6</sup> no special words or limitations were necessary to call it into being. On the other hand, words or circumstances of negation were indispensable to avoid it. Whenever it was shown that property had vested in two or more persons, by the same joint purchase, there arose at once, both at law and in equity, the presumption that it vested as an estate in joint-tenancy.<sup>7</sup> This presumption is liable to be overthrown in equity by proof of circumstances from which the Court may infer that the parties intended a several rather than a joint estate.

<sup>1</sup> *Pearce v. Savage*, 45 Me. 102; *Goodwin v. Richardson*, 11 Mass. 469; 2 Powell's Mort. 672.

<sup>2</sup> *Edwards v. Fashion*, Pre. Ch. 332; S. C. 1 Eq. Ca. Abr. 292.

<sup>3</sup> *Greer v. Blanchard*, 40 Cal. 197.

<sup>4</sup> Litt. sec. 278; *Putney v. Dresser*, 2 Met. 586.

<sup>5</sup> Co. Litt. 181 a.

<sup>6</sup> Co. Litt. 182 a; *Jickling on the Analogy between Legal and Equitable Estates*, 234; *Gilbert v. Richards*, 7 Vt. 208.

<sup>7</sup> *Aveling v. Knipe*, 19 Ves. 441; *Dart on Vendors and Purchasers*, 432; *Robinson v. Preston*, 4 Kay & J. 505.



§ 19. **Presumption where Property was acquired for Trade.**—Where lands are conveyed to partners, or others, for the purposes of trade or joint speculation, the presumption arises that the purchase is “only the substratum for an adventure, in the profits of which it was intended they should be concerned;” and therefore no survivorship will be allowed in equity.<sup>1</sup> The same is true where, though originally joint-tenants, the parties contract to deal with their property as if in trade.<sup>2</sup>

§ 20. **The presumption where one tenant advances more than his share of purchase money** is frequently and distinctly spoken of in the text-books. Thus, Mr. Dart feels warranted in asserting that, “if two purchase and one advance more of the purchase money than the other, there will, in equity, be no survivorship, although there are no words indicating a tenancy in common.”<sup>3</sup> The assertion thus made is, however, qualified by Sir Edward Sugden, and restrained to cases where this inequality appears *from the deed itself*.<sup>4</sup> It is worthy of remark that the rule as laid down by Mr. Dart, without the qualification, is founded upon a dictum, and this dictum is in turn based upon a prior one. Mr. Dart relies upon the language of Lord Chancellor Hardwicke, when his Lordship asserts that “it has been determined that if two purchase, and one advances more of the purchase money than the other, there shall be no survivorship.”<sup>5</sup> The case decided by Lord Hardwicke did not require any investigation or decision in regard to the rights of co-purchasers making unequal advances. In the case referred to by him as determining the question, the parties had been jointly interested in an undertaking, and, the better to advance their common in-

<sup>1</sup> *Lyster v. Dolland*, 1 Ves. Jr. 431; *Dale v. Hamilton*, 5 Hare, 369; *Elliott v. Brown*, 8 Swanst. 489; *Houghton v. Houghton*, 11 Sim. 491; *Morris v. Barrett*, 3 Y. & J. 384; *Rathwell v. Rathwell*, 26 Q. B. (Upper Canada) 184; *Lake v. Gibson*, 1 Eq. Ca. Ab. 294; *Duncan v. Forrer*, 6 Binn. 196.

<sup>2</sup> *Jeffereys v. Small*, 1 Vern. 217.

<sup>3</sup> *Dart on Vendors and Purchasers*, 432 of Am. ed.

<sup>4</sup> *Sugd. on Vendors*, 901 of 7th Am. ed. This limitation is based on and supported by *Lake v. Gibson*, 1 Eq. Ca. Abr. 291; and seems to be approved by *Caines v. Grant*, 5 Binn. 122.

<sup>5</sup> *Rigden v. Vallier*, 2 Ves. Sr. 258.

terest, had purchased certain lands, to which purchase some of them had not contributed their proportion of funds. Here was a case, then, where the presumption of joint-tenancy was rebutted by the conceded fact that the subject-matter of the controversy had been acquired in the prosecution of a joint adventure, undertaken for the purpose of speculation or of common profit. Hence the Master of the Rolls "decreed that survivorship should not take place; for that payment of money created a trust for the parties advancing the same; and an undertaking upon the hazard of profit or loss was in the nature of merchandising, where the *jus accrescendi* is never allowed."<sup>1</sup> A decision made at a more recent date than any of those referred to, seems to have necessarily involved this question. Two persons had certain stocks, part of which were acquired by equal and part by unequal advances. According to the very meagre and unsatisfactory report of the case, the Court determined that the stock paid for equally was held in joint-tenancy, and that there was no reason to infer that the other stock was held in any different manner.<sup>2</sup>

§ 21. **Parol Evidence to Rebut Presumption of Joint-Tenancy.**—Notwithstanding the Statute of Frauds, parol evidence is admissible to rebut the presumption of joint-tenancy, by showing that the parties, though originally holding jointly, had contracted to deal with their property as if in trade.<sup>3</sup> But whenever it is sought to show that the parties have turned their joint estate into a tenancy in common, it has been held that the parol evidence admissible for that purpose must be confined to the acts of the parties, showing the manner in which the property was treated and the purposes in which it was embarked, and can in no case include evidence of mere declarations of intention.<sup>4</sup>

§ 22. **Parol Evidence to establish Cotenancy.**—Where, upon joint purchase of an estate, the conveyance is made to

<sup>1</sup> *Lake v. Craddock*, 3 P. Wms. 159.

<sup>2</sup> *Harris v. Fergusson*, 16 Sim. 308.

<sup>3</sup> *Jeffereys v. Small*, 1 Vern. 217; *Robinson v. Preston*, 4 Kay and J. 505.

<sup>4</sup> *Harrison v. Barton*, 1 Johnson & Hemming, 293.

but one of the purchasers, the trust in favor of the co-purchaser may be proved by any evidence in writing made at or after the purchase.<sup>1</sup> But if the parties have advanced their money in pursuance of an agreement to make a joint purchase, a resulting trust arises which may be established by parol, and enforced against him in whose sole name the deed has been taken.<sup>2</sup>

§ 23. **Creation of Joint-Tenancy by Bequest or Devise.**—At an early day, it was sometimes questioned whether a legacy could be held in joint-tenancy. The rule, however, was soon established that bequests, as well as devises and conveyances, should be deemed to pass estates in joint-tenancy unless a contrary intent appeared.<sup>3</sup> This contrary intent must be apparent from the will itself. No doubt the Courts always lean towards tenancy in common when the parties claim under a will, and are ever ready to give full effect to any language of the testator showing a design to create several interests. “It may be stated generally, that all expressions importing division by equal or unequal shares, or referring to the devisees as owners of respective or distinct interests and even words simply denoting equality, will have this effect.”<sup>4</sup> In wills, the Courts construe survivorship into some other word, if possible.<sup>5</sup> Whenever a bequest or devise is to two or more “equally,”<sup>6</sup> or “to be equally divided,”<sup>7</sup> or “in equal shares,”<sup>8</sup>

<sup>1</sup> 2 Sugd. on Vendors, 678 (7th Am. ed. 388.)

<sup>2</sup> Dart on Vendors and Purchasers (4th Eng. ed.) 850; Sugden on Vendors (7th Am. ed.) 388; *Scott v. McKinney*, 98 Mass. 344.

<sup>3</sup> *Campbell v. Campbell*, 4 Bro. 15; *Armstrong v. Armstrong* L. R. 7 Eq. 518; *Martin v. Smith*, 5 Binn. 16; *Crooke v. De Vandes*, 9 Ves. 204; *Morgan v. Britten* L. R. 13 Eq. 28.

<sup>4</sup> 2 Powell on Dev. ch. 18, p. 370; quoted and approved in *Gilpin v. Hollingsworth*, 3 Md. 195. See also *Ettricke v. Ettricke*, Amb. 656; *Gordon v. Atkinson*, 1 De G. & S. 478; *Griswold v. Johnson*, 5 Conn. 365; *Dunn v. Bryan*, 38 Geo. 154; *Allison v. Kurtz*, 2 Watts, 185; *Wescott v. Cady*, 5 Johns. Ch. 334; *Vreeland v. Van Ryper*, 17 N. J. Eq. 134; *Ryves v. Ryves*, L. R. 11 Eq. 541; *Att’y Gen’l v. Fletcher*, L. R. 13 Eq. 128.

<sup>5</sup> 4 Dane’s Ab. 760.

<sup>6</sup> *Heron v. Walsh*, 3 Grant’s Ch. (Upper Canada) 606; *Heathe v. Heathe*, 2 Atk. 121; *Torret v. Frampton*, Style, 434; *Bagley v. Cook*, 3 Drew, 662.

<sup>7</sup> *Stewart v. Garnett*, 3 Sim. 398; *Briscoe v. McGee*, 2 J. J. M. 370; *Jensur v. Jenour*, 10 Ves. 569; *Esdaile v. Wilshere*, 9 Law J. Rep. Ch. 71; *Hodges v. Grant*, 36 Law J. Rep. (N. S.) Chanc. 395; Law R. Ex. 140.

<sup>8</sup> *Emerson v. Cutler*, 14 Pick. 114; *Hart v. Marks*, 4 Bradf. 161.

or "equally among,"<sup>1</sup> or "to and amongst them,"<sup>2</sup> or to them "respectively,"<sup>3</sup> or according to quantity and quality, each to take his part when he comes of age,<sup>4</sup> the devisees or legatees, as the case may be, will acquire the property as tenants in common. "It hardly seems," says Mr. Jickling, "desirable to accumulate authorities on this head: it may be sufficient to observe, that any words of severance, whether 'share and share alike,'<sup>5</sup> 'between,'<sup>6</sup> 'among,' 'equally to be divided,' '*videlicet*,'<sup>7</sup> 'by and between,'<sup>8</sup> 'severally,'<sup>9</sup> and similar expressions, would probably at law, and certainly in equity, have that effect."<sup>10</sup> So a devise to two persons to the longest liver of them, to be equally divided between them, creates a tenancy in common;<sup>11</sup> and a like result follows a devise "equally to my brother A's eldest son, and his heirs, and to my brother B's eldest son and his heirs jointly to be enjoyed by them, their heirs and assigns forever."<sup>12</sup> A tenancy in common also arises from a devise to A and B, to be held and divided by them as they shall deem most equal.<sup>13</sup> A devise was made to the children of J. B. equally, share and share alike, for and during the term of their joint natural lives, or the life of the survivor, or longer liver of them. It was held that the children took as tenants in common, without benefit of survivorship.<sup>14</sup> A testator bequeathed to his grandchildren a legacy of one thousand pounds, payable to each of them on their attaining twenty-one years of age. The words, payable to each of them, were considered as equivalent to "to be divided between them," and the grandchildren were therefore

<sup>1</sup> *Denn v. Gaskin*, Cowp. 657; *Morley v. Bird*, 3 Ves. 690.

<sup>2</sup> *Campbell v. Campbell*, 4 Bro. 15.

<sup>3</sup> *Lewen v. Cox*, Cro. Eliz. 695; *Moore's Settlement*, 10 W. R. 315; 31 Law J. Rep. (N. S.) Ch. 364; *Gordon v. Atkinson*, 1 De G. & S. 478.

<sup>4</sup> *Harrison v. Botts*, 4 Bibb, 420.

<sup>5</sup> *Jacques v. Collins*, Cro. Car. 75.

<sup>6</sup> *Perkins v. Baynton*, 1 Bro. C. C. 118; *Lashbrook v. Cock*, 2 Mer. 70.

<sup>7</sup> *Kew v. Rowse*, 1 Vern. 353.

<sup>8</sup> *Prince v. Heylyn*, 1 Atk. 493.

<sup>9</sup> See 2 Atk. 441.

<sup>10</sup> Jickling on Legal and Equitable Estates, 237. See also *Blewitt v. Roberts*, 10 L. J. Rep. (N. S.) 342; 1 Cr. & P. 274; *Paine v. Wagner*, 12 Sim. 184.

<sup>11</sup> *Blissett v. Cranwell*, 2 Lev. 373; Salk. 226.

<sup>12</sup> *Evans v. Brittain*, 3 S. & R. 135.

<sup>13</sup> *Ingalls v. Arnold*, 14 Q. B. (Upper Canada) 296.

<sup>14</sup> *Bryan v. Twigg*, 37 Law J. Rep. (N. S.) 249; S. C. Law Rep. 3 Chanc. 183.

treated as tenants in common.<sup>1</sup> But in New York, where a testator bequeathed a share of his estate to W. S. and F. S., "to be paid them when they come of age," the Court thought it "clear that the legacy in question was given to the donees as joint-tenants," because "the terms of the clause directing payment are joint in their effect, and not several: the share is to be paid to them when they come of age."<sup>2</sup> A testator having made a will giving his residuary estate to A and B, subsequently, by a codicil, provided that such residuary interest should go to A, B, and C, "so that C should participate in such bequest free from legacy duty with A and B." In determining what estate the legatees were entitled to under this will, the Lord Chancellor stated that he had no doubt that such words as "amongst," "alike," "respectively," "equally," and "anything which in the slightest degree indicates an intention to divide the property, must be held to abrogate the idea of a joint-tenancy, and to create a tenancy in common;" that "amongst" and "respectively" are not stronger words than "participate;" and he "had no doubt that the word 'participate' is sufficient to indicate an intention to divide, and to create a tenancy in common."<sup>3</sup>

§ 24. **Cases where Devises have been regarded as Joint.**—Where a devise was to trustees "to pay certain rents, profits, etc., to three boys, or to the survivor or survivors of them, share and share alike," the Master of the Rolls said: "There is some difficulty in the construction, but, on the whole, I think the boys take equitable estates in fee, as joint-tenants."<sup>4</sup> Real estate having been devised to A, B, and C, to be sold, and the money to be equally divided between them, this devise was construed as creating a joint-tenancy in the land, but a tenancy in common of the produce of the land, when sold.<sup>5</sup> A testator gave the residue of his estate to trustees, to pay the interest to his four grand-

<sup>1</sup> *Stewart v. Garnett*, 3 Sim. 398. See also *Hand v. North*, 33 Law J. Rep. (N. S.) Chanc. 556.

<sup>2</sup> *Putnam v. Putnam*, 4 Bradf. 308.

<sup>3</sup> *Robertson v. Fraser*, L. R. 6 Ch. App. 699.

<sup>4</sup> *Moore v. Cleghorn*, 10 Beav. 425.

<sup>5</sup> Goodtith on dem. of *Roebuck v. Oxley*, 7 D. & R. 535.

daughters "equally between them, share and share alike, for and during their several and respective lives, and from and after the decease of the survivor of them," to divide the principal among their children. Two of these four persons having died, the question arose whether the two still living were entitled to an interest as survivors. Lord Chancellor Thurlow said, that "though the words 'equally to be divided,' and 'share and share alike,' were in general construed in a will to create a tenancy in common, yet, where the context shows a joint-tenancy to be intended, the words shall be construed accordingly; and that, in this case, it was evident, that the interest was to be divided among four while four were alive; among three while three were alive; and nothing was to go to the children while any one of their mothers were living; and declared the whole interest to belong to the two living granddaughters, by survivorship."<sup>1</sup> A devise was made to the testator's two nieces "equally between them, to take as joint-tenants, and to their several and respective heirs and assigns forever:" Held, "that due effect may be given to all the words in this devise, by deciding that the devisees, the nieces, took an estate for their joint lives and the life of the survivor; that is, as joint-tenants, with remainder to each of them as tenants in common in fee after the death of the surviving life: in other words, that they took as tenants in common in fee, subject to an estate for their joint lives and the life of the survivor."<sup>2</sup> A testator directed that a sum of money be settled to the use of his two nephews, "and the survivors and survivor of them, and their heirs and assigns forever, equally to be divided between them, share and share alike." In order to give every word of the will effect, the Lord Chancellor construed it as making the two nephews joint-tenants for life, with several inheritances to them in common.<sup>3</sup>

§ 25. **Creation of Joint-Tenancy by Deed.**—In a preceding section, it has been shown that all joint acquisitions of

<sup>1</sup> *Armstrong & Eldridge*, 3 Bro. C. C. 215.

<sup>2</sup> *Doe on dem. of Littlewood v. Green*, 8 Law J. Rep. (N. S.) Exc. 95; S. C. 4 Mees. & W. 229.

<sup>3</sup> *Barker v. Giles*, 2 P. Wms. 281.

property by a common purchase, are, at common law, presumed to be acquired in joint-tenancy. This rule was applied to a patent from the State of Virginia to a father and his two sons, where part of the land had been held by the parties under separate patents, and they had surrendered these patents and taken another in their joint names, including a large tract of land not embraced in the surrendered patents.<sup>1</sup> No doubt, any conveyance apportioning the property conveyed and designating the interests of each grantee, creates a tenancy in common. One instance of this apportionment is where "lands be given to two to have and to hold the one moiety to the one and to his heires, and the other moiety to the other and to his heires."<sup>2</sup> "And the reason is, because they have severall freeholds and an occupation *pro indivisos*. Here it is to be observed, that the habendum doth sever the premises that *prima facie* seemed to be joint: for an express estate contrrolls an implied estate."<sup>3</sup> A deed to two of a tract of land without locating the share of each, but giving one about three-fifths and the other about two-fifths, makes them tenants in common.<sup>4</sup> The effect of such words as "equally," "share and share alike," etc., in creating a tenancy in common, when used in wills, was, as long ago as the decision of *Heathe v. Heathe*,<sup>5</sup> said to have been established for at least two hundred years. However this may be, it is certain that a similar effect was denied to such words at a much later date, and by very high authority. When the question arose in the case of *Fisher v. Wigg*,<sup>6</sup> two of the Judges argued that all parts of a deed should be given effect, if possible, that the grantor's intent should be permitted to prevail, and that as no particular words were essential to the creation of a tenancy in common, any language indicating that the grantor intended to convey a several, rather than a joint estate, should be permitted to accomplish the purpose for which it was so manifestly designed. Against the opinion of these two Judges was that of Lord Holt; and such were

<sup>1</sup> *Jones v. Jones*, 1 Call. 469.

<sup>2</sup> Litt. sec. 298.

<sup>3</sup> Co. Litt. 190 b.

<sup>4</sup> *Taylor v. Craig*, 6 B. Monr. 457.

<sup>5</sup> 2 Atk. 122.

<sup>6</sup> 1 Ld. Raym. 622.



the force of his great name and the deference felt for his judgment, that the conclusion thus disputed by him could scarcely be regarded as established by even a preponderance of authority, until about a half a century later, when Lord Hardwicke declared that, with all his respect for so eminent a man, still he felt compelled, on this question, to dissent from the opinion of Lord Holt, and assent to that of the two Judges.<sup>1</sup> The words in the premises of a deed, "to them or *any* of them, their or any of their heirs," are equivalent to "to each of them, and each of their heirs," and vest an estate in the grantees as tenants in common, notwithstanding the *habendum* is "*to them and their heirs and assigns forever.*"<sup>2</sup> And though the premises of a deed be "to A and B and to their heirs and assigns," still these words may be controlled and a tenancy in common created by a *habendum* "to the said A and B, their and *each of their* heirs and assigns, to the only proper use and behoof of the said A and B, and their and *each of their* heirs and assigns forever."<sup>3</sup>

§ 26. **Deed to Woman and her Children.**—A deed, devise, or bequest, to a man and his children, or to a woman and her children, without any additional words, must be regarded in the same manner as though made to any other class or number of persons. The grantees, therefore, take as joint-tenants.<sup>4</sup> A conveyance or gift to a woman and her heirs vests in her an estate in fee. But the other words in the deed may be such as to show that the children take a present interest. If so, the whole deed will be rendered effectual, by giving the children an estate as joint-tenants or as tenants in common with their mother, according to the intention of the grantor, as manifested by his deed.<sup>5</sup> A bequest was made to A, and at her death "*to the heirs of her body and their heirs*

<sup>1</sup> *Rigden v. Vallier*, 2 Ves. Sr. 252.

<sup>2</sup> *Galbraith v. Galbraith*, 3 S. & R. 392.

<sup>3</sup> *Bambaugh v. Bambaugh*, 11 Serg. & R. 191.

<sup>4</sup> *Mason v. Clarke*, 17 Beav. 126; *Newell v. Newell*, L. R. 7 Oh. 253; *Jackson v. Coggin*, 29 Geo. 403; *Hoyle v. Jones*, 85 Geo. 40; *Powell v. Powell*, 5 Bush. 619; *Bustard v. Saunders*, 7 Beav. 92; *Crockett v. Crockett*, 2 Phill. 553; *Webb v. Byng*, 2 Kay & J. 669; *De Witte v. De Witte*, 11 Sim. 41; *Morgan v. Britten*, L. R. 13 Eq. 28; *Eagles v. Le Breton*, L. R. 15 Eq. 148; *Utz's Estate*, 43 Cal. 204; *Oates v. Jackson*, 2 Str. 1172.

<sup>5</sup> *Gadsden v. Cappedeville*, 3 Rich Law, 467.



*and assigns forever;*" and "if she should leave no issue, then to be disposed of as she should think proper." It was held to be clear that the testator intended to give the children an interest in the bequest beyond the control of their mother, otherwise he would not have mentioned that in case of her death without issue, she should have a disposing power.<sup>1</sup>

§ 27. **Executory Settlements.**—In some instances, power has been given to a person, or to a number of persons, to settle or dispose of funds or other property for the benefit of children or others; and the power not having been executed by the original trustees, the proper manner of carrying it into effect has been considered and determined by the Courts. In the case of marriage settlements designed for the benefit of the issue of the marriage, the Courts direct such a disposition of the property as will entitle the children thereto as tenants in common. "Joint-tenancy," said Lord Redesdale, "as a provision for the children of a marriage, is an inconvenient mode of settlement, because, during their minority, no use can be made of their portions for their advancement, as the joint-tenancy cannot be severed."<sup>2</sup> And so when a trustee, directed to use funds for the benefit of children as he thinks best, dies, the Court will execute the trust by disposing of the funds between the children as tenants in common.<sup>3</sup>

§ 28. **If a devise or bequest be made to several,** and one or more die before the testator, then the surviving legatees or devisees will take the entire property so bequeathed or devised, unless the will contained words indicating that the testator intended a several rather than a joint estate;<sup>4</sup> and this is true even where the will contains a clause providing for the disposal of lapsed legacies.<sup>5</sup> The rule goes

<sup>1</sup> *Dott v. Willson*, 1 Bay, 457.

<sup>2</sup> *Taggart v. Taggart*, 1 Schoales & L. 88.

<sup>3</sup> *Phene's Trusts*, L. R. 5 Eq. 346; *Mayn v. Mayn*, 5 L. R. 5 Eq. 150.

<sup>4</sup> *Morley v. Bird*, 3 Ves, 628; *Cowdin v. Perry*, 11 Pick. 503; *Ball v. Deas*, 2 Strob. Eq. 24; *Larkins v. Larkins*, 3 Bos. & Pul. 16; *Buffar v. Bradford*, 2 Atk. 220; *Frewen v. Relfe*, 2 Bro. C. C. 220; *Welling v. Baine*, 3 P. Wms. 113; *Miller v. Webster*, 2 Vern. 207; *Ledsome v. Hickman*, 2 Vern. 611.

<sup>5</sup> *Gilbert v. Richards*, 7 Vt. 203.

still further; and where, from any cause, some of the persons named cannot or will not take the thing granted or devised, gives the whole to those who have the desire and capacity to receive it.<sup>1</sup> Thus, in Kentucky, when a patent had issued to two for certain lands, as it appeared that one of them died before the patent issued, the Court held that "the intention of the grantor and the object of the grant will be better attained by admitting the title of the whole to pass to the living grantee."<sup>2</sup> A devise having been made to the son and daughter of W. W., and being uncertain, because W. W. had four sons, the whole was given to the daughter.<sup>3</sup> A bequest was made to A. W. and J. W. Subsequently, the testator, by a codicil, annulled and revoked every legacy of A. W. The effect of this revocation coming up, before Lord Hardwicke for decision, he said: "Two points arise. 1st, Whether the codicil is a revocation of the whole gift; 2d, If not of the whole, whether of a moiety. 1st. It was necessary for the plaintiff to insist on its being a revocation of the whole, otherwise it could not be so of a moiety. In support of it, it is said, as it is a gift of the whole to both, with survivorship, each has a benefit by the gift to the other, from the chance he has in the other's share, from whence a revocation of the interest of one revokes such benefit accruing to the other, which is in the whole, and the substance of the gift. But this point is determined in *Davis v. Kemp*, Carth. 2, for the intent was that the defendant should take a moiety, and he must have it; and though he fails in the circumstances, yet he shall take it by devise." His Lordship then disposes of the second point as follows: "It is objected the estate is given to them jointly; that survivorship is essential to joint-tenancy, and by that only one can take the whole; that here is no survivorship. If an estate is limited to two jointly, the one capable of taking and the other not, he who is capable shall take the whole. Where a joint-tenancy to two is created in a devise, and the

<sup>1</sup> *Davy v. Kemp*, Orl. Bridgm. 387; *Alexander v. Alexander*, 2 Ves. Sr. 645; *Hawkins v. Kemp*, 3 East, 410; *Nicholson v. Woodsworth*, 2 Swanst. 365; *Townson v. Tickell*, 3 Barn. & Ald. 31; *Begnie v. Crook*, 2 Bing. N. C. 70; S. C. 2 Scott, 128; *Jones v. Maffet*, 5 Serg. & R. 523.

<sup>2</sup> *Overton v. Lacy*, 6 Monr. 16. The rule also applies to conveyances: see *Wythe's Reports*, 373, Appendix.

<sup>3</sup> *Dowset v. Sweet*, Ambl. 175.

estate vests by the death of one, the survivor takes by the gift, from the nature of the estate, and after the release or death of one, it is pleadable by the other as a devise to him alone, which could not be the case unless he took the whole by bequest; and suppose the testator revokes the interest of the one, the law and consequence must be the same."<sup>1</sup>

§ 29. **Severance.**—A joint-tenancy may be severed in three ways: 1st, by an act of one of the tenants operating on his own share, and creating a severance as to that share; 2d, by mutual agreement; and 3d, by such a course of dealing as intimates "that the interests of all were mutually treated as constituting a tenancy in common."<sup>2</sup> To this may be added, as a fourth means of severance, proceedings against the joint-tenant producing an involuntary alienation of his title.

§ 30. **Severance by Act of a Tenant.**—A demise by one of the joint-tenants severs the joint-tenancy and turns it into a tenancy in common,<sup>3</sup> although the lease is not to commence until after the lessor's death.<sup>4</sup> A mortgage executed by any of the joint-tenants also operates as a severance.<sup>5</sup> "A contract for sale by a joint-tenant seems to be, in equity, a severance of the joint-tenancy."<sup>6</sup> A surrender by joint-tenant of a copyhold estate, to enable the lord to regrant, is a severance."<sup>7</sup>

§ 31. **Severance by Mutual Agreement.**—A joint-tenancy may be severed by any contract entered into by the cotenants for that purpose.<sup>8</sup> A mere declaration that a joint-tenancy shall be severed will not effect a severance, but an express agreement to that effect will.<sup>9</sup>

<sup>1</sup> *Humphrey v. Tayleur*, Amb. 136; 1 Dick, 161.

<sup>2</sup> *Williams v. Hensman*, 1 Johns. & H. 557.

<sup>3</sup> *Doe v. Read*, 12 East, 57; *Roe v. Lonsdale*, 12 East, 89.

<sup>4</sup> *Clerk v. Clerk*, 2 Vern. 323; *Gould v. Kemp*, 2 Mylne & K. 310.

<sup>5</sup> *Simpson v. Ammons*, 1 Binn. 177; *York v. Stone*, 1 Salk. 158; S. C. 1 Eq. Cas. Ab. 293.

<sup>6</sup> *Dart on Vendors and Purchasers*, 4 Eng. ed. 253; *Brown v. Raidle*, 3 Ves. 256. For severance by marriage settlements, see *Caldwell v. Fellowes*, L. R. 9 Eq. 410.

<sup>7</sup> *Edwards v. Champion*, 21 E. L. & E. 230; S. C. 1 De G. & S. 75.

<sup>8</sup> *Frewen v. Relfe*, 2 Brown's C. C. 224.

<sup>9</sup> *Gould v. Kemp*, 2 Mylne & K. 310; *Patricke v. Powlett*, 2 Atk. 154.

§ 32. **Severance by a Course of Dealing.**—Severance may always be inferred from the fact that the subject-matter of the joint ownership has been embarked in commercial or speculative enterprises. It may also be inferred from any other course of dealing between the tenants manifesting an intent to change the joint holding. Thus, where eight persons were interested in certain funds, and five of them directed the trustee to invest the funds in a mortgage, this investment destroyed the joint-tenancy between the five and the three others, but the five remained joint-tenants between themselves.<sup>1</sup> If money is laid out jointly upon an estate held in joint-tenancy with a view to its improvement, this, in this Court, is a severance.”<sup>2</sup> “A separate dealing by joint-tenants of the property may sever the joint-tenancy and create a tenancy in common. But I do not think this inference is to be drawn merely from the circumstance that a trustee, having realized part of the estate, has paid the money received, in certain proportions, to the parties in severalty. As to the money not received, they still remain joint-tenants.”<sup>3</sup> “Until some act is done to sever, the interest remains as it previously was, an interest in joint-tenancy. The burthen of proof lies on those who contend that a joint-tenancy has been severed.”<sup>3</sup>

§ 33. **Severance by Process against a Tenant.**—The issuing of execution on a judgment operates as a legal severance, if, without any further proceedings, a *venditioni exponas* may be taken out and the lands sold.<sup>4</sup> “A fine or recovery by one joint-tenant only, severs the joint-tenancy.”<sup>5</sup>

§ 34. **On a severance by one only where there are three tenants, or by two where there are four or more tenants, the remaining shares will be held in joint-tenancy.** So where one joint-tenant alienates a moiety of his moiety, the severance will affect only the share so alienated, and an equal share of the other joint-tenants.<sup>6</sup> And where there are eight joint-

<sup>1</sup> *Williams v. Hensman*, 1 John. & Hem. 557.

<sup>2</sup> *Telfair v. Howe*, 3 Rich. Eq. 239; *Lyster v. Dolland*, 1 Ves. Jr. 434.

<sup>3</sup> *Leak v. McDowall*, 32 Beav. 30.

<sup>4</sup> *Davidson v. Heydon*, 2 Yeates, 463; *Hair v. Avery*, 28 Ala. 267.

<sup>5</sup> *Moody v. Moody*, Ambl. 649; *Ford v. Grey*, 6 Mod. 45.

<sup>6</sup> *Preston on Abstracts of Title*, 60.

tenants, and five effect a severance, the other three remain joint-tenants with one another, and the five become joint-tenants of the portions severed and appropriated by them.<sup>1</sup>

JOINT-TENANCY IN THE UNITED STATES.

§ 35. **Statutes Abolishing or Limiting.**—The importance of the law of joint-tenancy has been very greatly diminished in the United States. This has been accomplished in three ways: 1st, By the entire abolition of this species of tenancy, as in Georgia,<sup>2</sup> Ohio,<sup>3</sup> Oregon,<sup>4</sup> and Tennessee.<sup>5</sup> 2d, By the enactment of laws providing, in effect, that at the decease of any joint-tenant his moiety should be distributed to his heirs, or devisees, in the same manner as if he were a tenant in common. This last course has been pursued by the Legislatures of Alabama,<sup>6</sup> Arkansas,<sup>7</sup> Florida,<sup>8</sup> North Carolina,<sup>9</sup> Pennsylvania (Purdon's Dig. 815,) South Carolina,<sup>10</sup> Texas,<sup>11</sup> Virginia,<sup>12</sup> West Virginia,<sup>13</sup> and Kentucky;<sup>14</sup> while in Connecticut the judiciary, at a very early day, and apparently without any legislative authority, entirely ignored what they quite appropriately styled "the odious and unjust doctrine of survivorship."<sup>15</sup> The third and principal way by which the number of joint-tenancies has been greatly diminished is by the enactment of statutes changing the rules of the common law so far as to require a grantor or deviser, wishing to create a joint-tenancy, to insert words in his deed or devise clearly

<sup>1</sup> Williams v. Hensman, 1 Johns. & H. 557.

<sup>2</sup> Code, Geo. sec. 2300; Lowe v. Brooks, 23 Geo. 325.

<sup>3</sup> Sergeant v. Steinberger, 2 Ohio, 305; Miles v. Fisher, 10 Ohio, 1; Wilson v. Fleming, 13 Ohio, 68.

<sup>4</sup> Deady's Comp. 719, sec. 38.

<sup>5</sup> Code of Tenn., sec. 2010.

<sup>6</sup> Code of Ala., sec. 1582.

<sup>7</sup> "All survivorships of real and personal estate are forever abolished." (Ark. Dig. by Gould, 628.)

<sup>8</sup> Thompson's Digest, 191; Bush's Dig. 286.

<sup>9</sup> Weir v. Tate, 4 Ired. Eq. 264.

<sup>10</sup> Comp. Laws, ed. of 1873, 440.

<sup>11</sup> Oldham v. White's Dig. 245; Paschal's Dig. Art. 3429.

<sup>12</sup> 3 Rob. Pr. 162-3.

<sup>13</sup> Code West Va. 462, secs. 18 and 19.

<sup>14</sup> 1 Washb. on R. P. 424; Genl. St. of Ky., ed. 1873, 586.

<sup>15</sup> Whittlesey v. Fuller, 11 Conn. 340, approving Phelps v. Jepson, 1 Root, 48, decided in 1769.

showing such intent.<sup>1</sup> The absence of such enactments in England caused expressions of regret to escape from Vice-Chancellor W. Page Wood, in pronouncing judgment in the case of *Williams v. Hensman*. He said: "In these questions

<sup>1</sup> The following note exhibits the provisions of most of the statutes in the United States by which the common law presumption in favor of joint-tenancy has been displaced in favor of tenancy in common.

In CALIFORNIA, "a joint interest is one owned by several persons in equal shares, by a title created by a single will or transfer, when expressly declared in the will or transfer to be a joint-tenancy, or when granted or devised to executors or trustees as joint-tenants." (Sec. 683 Civil Code.) Sec. 686 same Code further declares that "every interest created in favor of several persons in their own right is an interest in common," unless acquired by a partnership, or declared at its creation to be a joint interest, or acquired as community property.

In DELAWARE, "no estate in joint-tenancy in lands, tenements, or hereditaments, shall be held or claimed by or under any grant, devise, or conveyance made to any persons other than to executors or trustees, unless the premises therein mentioned shall be expressly granted, devised, or conveyed to such persons to be held as joint-tenants and not as tenants in common." (Sec. 1720 Rev. St. Del. ed. of 1852.)

In ILLINOIS, sec. 5 of Chapter on Conveyances (see Comp. Laws, ed. of 1868, 101) enacts that "no estate in joint-tenancy in any lands, tenements, or hereditaments, shall be held or claimed under any grant, devise, or conveyance whatsoever, heretofore or hereafter made, other than to executors or trustees, unless the premises therein mentioned shall expressly be thereby declared to pass, not in tenancy in common, but in joint-tenancy; and every such estate, other than to executors or trustees, (unless otherwise expressly declared as aforesaid,) shall be deemed to be a tenancy in common."

Sec. 7 of Act concerning Conveyances in INDIANA, provides that "all conveyances and devises of lands, or of any interest therein, made to two or more persons, except as provided in the next following section, shall be construed to create estates in common and not in joint-tenancy; unless it shall be expressed therein that the grantees or devisees shall hold the same in joint-tenancy and to the survivor of them, or it shall manifestly appear, from the tenor of the instrument, that it was intended to create an estate in joint-tenancy." Sec. 8 provides that section 7 shall not apply to mortgages, nor to conveyances in trust, nor to conveyances to husband and wife.

By sec. 1939 Code of IOWA, "conveyances to two or more in their own right create a tenancy in common, unless a contrary intent is expressed."

In KENTUCKY, "when a joint-tenant dies, his part of the joint estate, real or personal, shall descend to his heirs, or pass by devise, or go to his personal representatives, subject to debts, curtesy, dower, or distribution." (Genl. St. ed. of 1873, p. 586, sec. 13.) But this section does not apply to the estates of executors or trustees, nor to other States, when it appears that it was intended that the part of one dying should belong to the others. (Ib. sec. 14.)

In MAINE, "conveyances not in mortgage, and devises of land to two or more persons, create estates in common, unless otherwise expressed. Estates vested in survivors upon the principle of joint-tenancy are to be so held." (Rev. St. Maine, ed. of 1871, 559.)

In MARYLAND, the Act of 1822, ch. 162, declares that "no deed, devise, or other instrument of writing which may hereafter be executed, shall be construed to create an estate in joint-tenancy, unless in such deed, devise, or other instrument of writing, it is expressly provided that the property conveyed by such deed, devise, etc., is to be held in joint-tenancy." (See *Craft v. Wilcox*, 4 Gill. 506; *Purdy v. Purdy*, 8 Md. Ch. Dec. 547; Maryland Code, sec. 850, p. 12, where the words "which may hereafter be executed" are omitted.)

of joint-tenancy, the Court has frequently been driven to rely on minute grounds for holding a severance to have taken place, by the unfortunate circumstance that the Legislature has not thought fit to interpose by introducing the rule, that

In MASSACHUSETTS, secs. 13 and 14 of the Chapter on Conveyances are similar to secs. 7 and 8 of the Indiana Act, already quoted. (Rev. of 1860, 466-7.)

In MICHIGAN, "all grants and devises of lands, made to two or more persons, except as provided in the following section, shall be construed to create estates in common, and not in joint-tenancy, unless expressly declared to be in joint-tenancy." (Sec. 44, 1829, Comp. Laws of Mich. 1871.) Sec. 45 provides that the preceding section shall not apply to mortgages, nor to devises or grants made in trust, or made to executors, or to husband and wife.

MINNESOTA.—Sec. 44 of the Act of this State in regard to Estates in Real Property, is a copy of sec. 41 of same act of Michigan, quoted above. The exception from the operation of the section does not name conveyances to husband and wife. (Genl. St. of Minn. ed. of 1873, 617.)

MISSOURI.—"Every interest in real estate granted or devised to two or more persons, other than to executors and trustees, or to husband and wife, shall be a tenancy in common, unless expressly declared in such grant or devise to be in joint-tenancy." (Comp. Law, ed. of 1865, 443.)

In NEVADA, "every interest in real estate granted or devised to two or more persons, other than executors or trustees, as such, shall be a tenancy in common, unless expressly declared in the grant or devise to be a joint-tenancy." (Sec. 269 Comp. Laws of Nev.)

NEW HAMPSHIRE.—"Every conveyance or devise of real estate to two or more persons shall be construed to create an estate in common and not in joint-tenancy, unless it shall be expressed therein that such an estate is to be holden by the grantees or devisees as joint-tenants, or to them and the survivor of them, or other words are used clearly expressing an intention to create a joint-tenancy." (Genl. St. ed. of 1867, 253, being sec. 14 of act concerning conveyances.)

NEW JERSEY.—The act of Feb. 4, 1812, declares: "No estate, after the passing of this act, shall in this State be considered and adjudged to be an estate in joint-tenancy except it be expressly set forth in the grant or devise creating such estate, that it is the intention of the parties to create an estate in joint-tenancy and not an estate in common, any law, usage, or decision heretofore made to the contrary notwithstanding." (Nixon's Digest, 4th ed. 150.)

NEW YORK.—"Every estate granted or devised to two or more persons, in their own right, shall be a tenancy in common, unless expressly declared to be in joint-tenancy; but every estate vested in executors or trustees, as such, shall be held by them in joint-tenancy. This section shall apply as well to estates already created or vested, as to estates hereafter to be granted or devised. (Rev. St. of N. Y. vol. 3, p. 14, ed. of 1859.)

In RHODE ISLAND, all grants, devises, etc., made to two or more persons, whether husband and wife or not, shall be construed as creating a tenancy in common, unless a contrary intent appears. (Comp. Laws, ed. of 1872, 348.)

TENNESSEE.—"In all estates, real and personal, held in joint-tenancy, the part or share of any tenant dying shall not descend or go to the surviving tenant or tenants, but shall descend or be vested in the heirs, executors, or administrators respectively of the tenant so dying, in the same manner as estates held by tenancy in common." (Genl. St. ed. of 1873, sec. 2010.)

The law in VERMONT is similar to that of Rhode Island, but it excepts devises and conveyances in trust, or to husband and wife. (Genl. St. of Vt. App. 1870, 446.)



express words shall be required to create a joint-tenancy, in place of the contrary rule which is established, that words pointing to severalty of interest are necessary to constitute a tenancy in common. Under certain circumstances, as in the case of mortgages of trust money, a joint-tenancy is a considerable convenience; but it would be very desirable that, in general, in the absence of any express direction, a tenancy in common should be the construction adopted."<sup>1</sup>

§ 36. **The Retroactive Effect of the Statutes abolishing the right of survivorship, or enacting that no estate shall be held in joint-tenancy unless so provided in the deed creating it, has been sustained in some of the States, but denied in others.** Thus, in Pennsylvania, a statute enacted that the part of the joint-tenant who should die first "shall not accrue to the survivor, but shall descend, or pass by devise." In construing this statute, the Court said: "Something was said in the argument of this cause against the constitutional power of the Legislature to pass an act affecting estates *then in existence*. But, on this point, we have no doubt: the act deprived no man of his property. Where title had already accrued by survivorship, it remained untouched. The only effect of the law was, to place the parties on an equal and sure footing, leaving nothing to chance; without depriving them, however, of the right of making any agreement between themselves which they may think proper. In such a law, there is nothing like an invasion of the rights of property, nor anything which is forbidden by the constitution of the Commonwealth."<sup>2</sup> By statute passed as early as 1785, Massachusetts declared that all gifts or grants which *have been* or shall be made to two or more persons, shall be deemed to be estates in common. "The statute," said Chief Justice Parker, in delivering the opinion of the Supreme Court, "in its terms, applies to estates created before as well as after its enactment. The principle is nevertheless correct, that the Legislature cannot impair the title to estates, without the consent of the proprietors, unless for public objects, when an adequate con-

<sup>1</sup> Johns. & H. 557.

<sup>2</sup> Bambaugh v. Bambaugh, 11 S. & R. 193.



sideration shall be provided. But there can be no objection to the operation of any legislative act retrospectively, which shall enlarge or otherwise make more valuable the title to any estate, for the consent of the holder may always be presumed to such acts. Now, it was clearly for the interest of both the grantees in the deed under consideration, that they should hold as tenants in common rather than as joint-tenants, inasmuch as a certain inheritance in a moiety is more valuable than an uncertain right of succession to the whole; and in this view, the objection to the operation of the statute, we think, is avoided.”<sup>1</sup> On the other hand, the highest Courts of some of the other States, without going into any discussion of principles, or giving any insight into the reasons which led them to do so, have declared that “the Legislature had not competent authority to give such an effect to the statute as would deprive joint-tenants of one of the essential elements of their tenure—the right of survivorship.”<sup>2</sup>

§ 37. **Creation notwithstanding Statutes.**—No doubt, but few attempts have been made, either by deed or devise, to create joint-tenancies by express words to that effect, in opposition to those statutes which have created presumptions in favor of tenancy in common. The fact that these attempts have been so unfrequent shows that, with the American people, joint-tenancy, if not a subject of aversion, is rarely a matter of preference. The words “*jointly and severally*” in a deed, though not inconsistent with the granting of a joint estate, are not sufficient to create a joint-tenancy in Massachusetts.<sup>3</sup> The statute in Delaware, provides that the estate shall be a tenancy in common, unless the deed or devise shows that it is “to be held as joint-tenancy, and not as a tenancy in common.” The words to A and B, “jointly their heirs and assigns forever,” were not deemed sufficient to create a joint estate, because the term “jointly” does not necessarily

<sup>1</sup> *Miller v. Miller*, 16 Mass. 61. See also similar views expressed by Wilde, J. in *Anable v. Patch*, 3 Pick. 363.

<sup>2</sup> *Greer v. Blanchar*, 40 Cal. 198; *Dewey v. Lambier*, 7 Cal. 348; *The Boston Franklinite Co. v. Condit*, 19 N. J. Eq. 399; *Den ex dem. Berdan v. Van Riper*, 1 Harr. N. J. 10.

<sup>3</sup> *Miller v. Miller*, 16 Mass. 60; *Bughardt v. Turner*, 12 Pick. 538. In this last case, the words were “jointly to be equally divided.”

mean a joint-tenancy, but may be applied to tenants in common who held jointly until severance.<sup>1</sup> A devise made by a father to his "children and the survivor and survivors of them," contain apt words to create a joint estate. The children will consequently hold as joint-tenants even under the statute in force in Massachusetts.<sup>2</sup>

§ 38. **Not forbidden by Law.**—The statutes enacting that at the decease of a joint-tenant his moiety shall descend to his heirs at law, or be subject to his devise, do not, it seems, place it beyond the power of a testator to create a survivorship. Thus, where a devise was made to three persons "as joint-tenants, and to the survivors and survivor of them," the intent to create a joint-tenancy and a survivorship was so clearly manifested, that the Court could only refuse to carry it into effect upon the ground that it was an unlawful intent. But the Court did not consider that the statute had made such an intent illegal, and therefore recognized and enforced the claim of the surviving devisee to the whole property.<sup>3</sup>

§ 39. **Dower under Statutes abolishing Survivorship.**—It has already been shown that the right of the surviving joint-tenant to the whole estate was, at common law, paramount to the claim of the wife of the deceased cotenant for dower. By the several American statutes abolishing survivorship, the only obstacle to the wife's obtaining dower has been removed; and in the States where those statutes exist, her claim has been as fully recognized as though her husband's estate had been that of a tenant in common.<sup>4</sup>

§ 40. **Lapsing of Legacies and Devises.**—We have seen that in at least ten of the States of the American Union, the only interference with joint-tenancy has been by abolishing the right of survivorship.<sup>5</sup> A very important question neces-

<sup>1</sup> *Davis v. Smith*, 4 Harr. 68.

<sup>2</sup> *Stimpson v. Batterman*, 5 Cush. 155.

<sup>3</sup> *Arnold v. Jack's Executors*, 24 Penn. St. 57; *Lentz v. Lentz*, 2 Phila. 117.

<sup>4</sup> *Holbrook v. Finney*, 4 Mass. 568; *Reed v. Kennedy*, 2 Strob. 69; *Weir v. Tate*, 4 Ired. Eq. 277; *Davis v. Logan*, 9 Dana, 185; *James v. Rowan*, 6 S. & M. 393.

<sup>5</sup> See sec. 35.

sarily arising in these States, is whether, when a deed, devise, or bequest, is made to two or more, without any words of severance, and one of them, from death or from any other cause, cannot receive the estate granted or bequeathed, shall his moiety vest in those who are competent to receive the estate, or shall it lapse, as in case of a grant or devise, to two or more as tenants in common. In the Appendix to Wythe's Reports<sup>1</sup> can be found the most thorough discussion of the common law doctrines and incidents of joint-tenancy which it has ever been our good fortune to discover. After showing that at common law the rule that the grantees or devisees who are competent to take the thing granted, take the whole as though they only had been named in the grant or devise, and that this rule was of universal application unless the estate was limited to them *separately*, and that it seemed to be in nowise dependent upon the *jus accrescendi*, the author proceeds to speak as follows of the statute of Virginia taking away the right of survivorship: "It does not annihilate the legal entity called a joint estate, so as to prevent any such estate from vesting, nor does it destroy the joint estate forthwith after it has vested. On the contrary, it permits the estate to subsist as joint, with all its former incidents, during the joint lives of all its owners; and if, in that time, partition be made, or a severance effected without partition, it is quiescent as a dead letter. It begins to operate at all only when one of the joint-tenants has died before partition or severance. And on the happening of that event, and from thenceforth, it directs that the part of the deceased shall be considered as if *he* had been a tenant in common, not from the beginning, but only when the event to which it refers happened. Where it applies, and to the extent of its application, it operates, *in articulo mortis*, a statutory severance; and that is all. It does not extirpate the quality of a joint estate, which made it produce, among other fruits, the *jus accrescendi*, but only destroys in the moment of production, or blights by anticipation in the bloom, that particular fruit. In this manner, it modifies the nature of a joint-tenancy by the common law, so far as to take away one of the incidents

<sup>1</sup> See Wythe's Rep. 361.

which the law has annexed to it, but leaves it in all other respects as it was. \* \* \* In short, since the statute, joint-tenants seem to have an estate that is to all purposes joint, both in its inception and also in its continuance, until a destruction or severance thereof takes place; which latter, where an interest has become vested, is effectuated by the statute at the moment any of them dies, to the extent of his part; and henceforth that part is to be regarded as it would have been (though the statute had never been enacted) if the joint estate had been to the same extent dissevered by any of the means which theretofore existed. And, if this be the sum of its efficacy, the consequence seems to be, that in regard to the lapsing of devises and legacies, and also in regard to the vesting of estates created or transferred by conveyances *inter vivos*, it has been productive of no change whatever.”<sup>1</sup>

§ 41. **Property still held in Joint-Tenancy.**—The statutes of the several States in regard to joint-tenancy (most of which have already been cited) do not, as a rule, include all kinds of property. So far as there are any decisions upon this subject, they establish the general proposition that joint-tenancy is only abolished as to the species of property necessarily included in the words of the statute. Thus, in Massachusetts, all conveyances and devises, made to two or more, were, except in certain cases, to be deemed tenancies in common. This statute, it was held, did not affect an estate acquired by *disseisin*, for the disseisors held neither by deed nor by devise.<sup>2</sup> For a like reason, the statutes of Massachusetts, New York, and Vermont, did not affect personal estate. These statutes spoke of grants and devises; terms which apply to real estate, and to real estate only.<sup>3</sup> The statute of Arkansas enacted that “all survivorships of real and personal estates are forever abolished.” The Courts of that State con-

<sup>1</sup> Wythe's Reports, 379, 380. The position here taken is no doubt inconsistent with *Sawyer v. Trueblood's Exrs.* 1 Murph. 190; but that case is apparently a misstatement rather than an interpretation of the statute under which it was made, and does not accord with the later case of *Weir v. Humphries*, 4 Ired. Eq. 277.

<sup>2</sup> *Putney v. Dresser*, 2 Met. 586.

<sup>3</sup> *Putman v. Putnan*, 4 Bradf. 309; *Decamp v. Hall*, 42 Vt. 485; *Emerson v. Cutler*, 14 Pick. 116.

sidered that the sole object of this act was to avoid the incident of survivorship whereby the longest liver became sole owner of the entire estate; that the act was not intended to interfere with the legal right of the surviving owner of a joint chose in action to prosecute a suit thereon in his own name; and therefore such a construction was given to the act as allowed one of the payees of a promissory note to maintain an action thereon after the decease of the other payee.<sup>1</sup>

§ 42. **Mortgagees.**—The statute of Massachusetts, passed in 1785, provided that all conveyances to two or more grantees shall be adjudged to convey estates in common, unless an intent to pass a joint estate appear from the conveyance. The question arose, at quite an early day, whether this statute abolished joint-tenancy in mortgages. Chief Justice Parsons delivered the opinion, holding that the mortgagees were joint-tenants, saying: “As upon the death of either mortgagee, the remedy to recover the debt would survive, we are of the opinion that it was the intent of the parties that the mortgage or collateral security should comport with that remedy; and, for this purpose, the mortgaged estate should survive. Upon any other construction, but one moiety of the mortgaged tenements would remain a collateral security for the joint debt; which would be clearly repugnant to the intention of the parties to the mortgage.”<sup>2</sup> Judge Story in deciding the same question, under a statute similar to the Massachusetts statute of 1785, dissented from the conclusion reached by Chief Justice Parsons, and denied the premises on which it was based. He said: “But with great deference to the learned Judge, the doctrine, that a conveyance in mortgage to two persons, as tenants in common, becomes by the death of either no security, except for a moiety, cannot, in my judgment, be maintained in point of law. No authority is cited for it, and it seems to me irreconcilable with established principles. It cannot be deduced from the fact, that the debt vests by survivorship in one party, while the estate

<sup>1</sup> Trammell v. Harrell, 4 Ark. 602; Sessions v. Peay, 19 Ib. 269.

<sup>2</sup> Appleton v. Boyd, 7 Mass. 134; Burnett v. Pratt, 22 Pick. 556. In Massachusetts, mortgages are now excepted from the operation of the statute. Blake v. Sanborn, 8 Gray, 154.

would pass to another. For at the common law, upon the death of the mortgagee, the estate in the land vests in the heir, while the debt vests in the administrator. Upon the like argument, it ought to follow in such case, that by the death of the mortgagee, the whole security in the land should be gone; and yet it is well established that the heir takes the land by descent, subject to redemption, and that the debt belongs to the administrator." After proceeding, by additional illustrations, to show that by holding the mortgagees to be tenants in common of the mortgaged estate, no inconvenience would result in enforcing their remedy, and that no diminution or division of the security would ensue, Judge Story rejected the Massachusetts decision, and declared that the mortgagees did not hold as joint-tenants.<sup>1</sup>

§ 43. **Co-Trustees.**—Some of the statutes enacted in the various States for the purpose of abolishing or discouraging joint-tenancy, or of robbing it of its grand incident of survivorship, except from their operation estates granted or devised to two or more as trustees. But, independent of any express exception, it has been generally, but not universally, decided that these statutes do not apply to estates held in trust. The object of the statutes was to prevent the vesting of the whole estate in one of the cotenants to the exclusion of the heirs of the other. It was thought best to change the rule of the common law so that the cotenant's heirs, who were supposed to be dear as well as near to him, and who had the strongest claims to his protection and to such advancement as might be obtained from his estate, should not be, in effect, disinherited, in the absence of some express stipulation in the deed by which the estate was created, clearly indicating that it was taken subject to the hazard of survivorship. But when lands are granted to two or more persons to be by them held in trust, they have no beneficial interest in the grant. If either die, the vesting of the entire *legal* estate in the other as survivor has no tendency to operate to the prejudice of those interested as beneficiaries. No children are, in effect, disinherited for the advantage of a stranger. The party

<sup>1</sup> *Randall v. Phillips*, 3 Mason C. C. 386.

creating the trust estate can hardly be supposed to have designed it to be held as a tenancy in common; for if so held, the death of either trustee, and the consequent descent of his legal estate to his heirs, would necessarily devolve, in part, the management of the trust upon persons who were strangers to the trustor, and upon whom he never thought of calling for its execution. The trustor, it may well be presumed, intended that *all* the trustees should join in effectuating the trust; but when, from death, one of them can no longer act, the trustor's designs will probably be better accomplished by regarding the remaining trustees as being exclusively charged with the administration of the trust, than by introducing the heirs of the deceased or an appointee of some Court to represent the late trustee and to participate in the management of the trust estate. Because the mischiefs which these statutes were intended to avoid never worked as mischiefs but rather as advantages in connection with estates held by trustees, these estates are regarded as beyond the scope and intent, and therefore beyond the operation of the statutes, and are liable to descend to the survivor or survivors, and in other respects to be treated as at common law.<sup>1</sup> On the other hand, it has been contended that a person choosing two trustees does so because he wants more than one, and that on conveying to two and their heirs, he naturally supposes that the heir of the one who first dies will act with the survivor; that while the evil consequences of survivorship are less in connection with trust estates than with others, still this does not justify Courts in exempting them from the operation of those statutes which on their face fail to express any such exemption, and that "it is much better for Courts to be governed by the plain words of a statute than to aim at evading their effect, even for good ends; and in no case should they be overridden, except one of evident necessity to affect an intent plainly shown."<sup>2</sup>

<sup>1</sup> *Parsons v. Boyd*, 20 Ala. 118; *Powell v. Knox*, 16 Ala. 364; *Gray v. Lynch*, 8 Gill. 423; *P. R. R. Co. v. L. N. Co.* 36 Pa. S. 204; *Shartz v. Unangst*, 3 Watts & S. 45; *Stewart v. Pettus*, 10 Mo. 755.

<sup>2</sup> *The Boston Franklinite Co. v. Condit*, 19 N. J. Eq. 398.



§ 44. **Joint-Tenancy of Trust Estates.**—Having shown that trust estates, notwithstanding the various American statutes relating to joint-tenancy, are held as at common law, we may now, without departing from the general plan of this work, briefly consider when and how far a trust estate held by two or more was necessarily a joint-tenancy at common law. “Where more trustees than one are appointed, the trust property is almost invariably limited to them as joint-tenants; and even if the terms of the gift rendered this at all doubtful, the Court, for the sake of convenience, would doubtless endeavor, if possible, to affix this construction to it. Therefore, upon the death of one of the original trustees, the whole estate, whether real or personal, devolves upon the survivors, and so on continually to the last survivor.”<sup>1</sup> “As co-trustees have an authority coupled with an interest, their office also must be impressed with the quality of survivorship: as if an estate be vested in two trustees upon trust to sell and one of them die, the other may sell; and if an advowson be conveyed to trustees upon trust to present a proper clerk, the survivor may present.”<sup>2</sup> That an estate vested in two or more as trustees survives in case of the death of one, is nowhere denied. The chief difficulty is to determine whether the instrument creating the alleged trust vests an estate in the trustees, or merely gives them a naked power to sell. “The general principle of the common law, as laid down by Lord Coke, (Co. Litt. 112 *b*,) and sanctioned by many judicial decisions, is, that when the power given to several persons is a mere naked power to sell, not coupled with an interest, it must be executed by all, and does not survive. But when the power is coupled with an interest, it may be executed by the survivor. But the difficulty arises in the application of the rule to particular cases. It may, perhaps, be considered as the better conclusion to be drawn from the English cases on this question, that a mere direction in a will to the executors to sell land, without any words vesting in them an interest in the land, or creating a trust, will only be a naked power

<sup>1</sup> Hill on Trustees, 303.

<sup>2</sup> Lewin on Trusts, 300; Lane v. Debenham, 17 Jur. 1005; Shook v. Shook, 19 Barb. 653; Wheatley v. Boyd, 7 Exo. 20; King v. Leach, 2 Hare, 59.



which does not survive. In such case, there is no one who has a right to enforce an execution of the power. But when anything is directed to be done, in which third persons are interested, and who have a right to call on the executors to execute the power, such power survives. This becomes necessary for the purpose of effecting the object of the power. It is not a power coupled with an interest in the executors, because they may derive a personal benefit from the devise. For a trust will survive though no way beneficial to the trustee. It is the possession of the legal estate, or a right in the subject over which the power is to be exercised, that makes the interest in question. And when an executor, guardian, or other trustee, is invested with the rents and profits of land, for the sale or use of another, it is still an authority coupled with an interest, and survives."<sup>1</sup> "It is not necessary that the interest coupled with the power should be a legal interest. An equitable interest is sufficient, and is regarded in this Court as the real interest. A trustee invested only with the use and profits of the land for the benefit of another, has an interest connected with his power. This was so understood in *Bergen v. Bennett*, (1 Caines Cas. in Error, 16); and in *Eyre v. Countess of Shaftsbury*, (2 P. Wms. 102,) a testamentary guardian, with authority to lease, was held to possess a power coupled with an interest, and capable of survivorship."<sup>2</sup> It is not within the province of this work to enter into a close examination of the subject of *powers*, nor to lay down minutely the tests by which to distinguish mere naked powers from those coupled with an interest. So far as trustees are concerned, we have no reason to consider anything beyond the nature of the tenure by which they hold their estates. And considering their estate, in reference to the character of their cotenancy, the rule seems to admit of no exception at common law, that, in the absence of a limitation to them as tenants in common, whatever estate or title vests in them, vests in joint-tenancy, and that where title is vested in them at all, subject to specified trusts, a power is

<sup>1</sup> *Peter v. Beverly*, 10 Pet. 564.

<sup>2</sup> *Osgood v. Franklin*, 2 Johns. Ch. 20.

thereby created coupled with an interest, and liable to survive to one trustee upon the decease of the others.<sup>1</sup>

§ 45. **Trust Estates vest in those who Accept.**—The rule that a grant or devise of an estate to two or more as joint-tenants vests the entire estate in those who may be qualified to receive the grant or devise at the time it becomes operative, applies to a cotenancy in a trust estate. If one or more of the trustees renounce or disclaim the trust, the whole of the estate vests in the trustee or trustees who are willing to accept it. The person or persons thus renouncing, thereafter stand in the same relation to the estate as though they had never been named as trustees; while those accepting are entitled to the estate in the same manner, and to the same extent, as though they only had been named in the grant or devise.<sup>2</sup>

§ 46. **Co-Executors and Co-Administrators**, “as such, are regarded in law as one person; and therefore if one of them sell the goods or the securities of the testator to a *bona fide* purchaser, who has no reason to suspect that such executor is committing a breach of trust, such purchaser will have a right to hold the same not only against the executors but also as against creditors and legatees.”<sup>3</sup> “Joint executors and administrators are possessed of the estate, each as of the entirety, and consequently the act of each is the act of all.”<sup>4</sup> But where by the will of the testator the executors receive the legal title to an estate, then they hold it “in the

<sup>1</sup> Zebach v. Smith, 3 Binn. 69; Davoue v. Fanning, 2 Johns. Ch. 254; Muldrow v. Fox, 2 Dana, 79; Hunt v. Rousmaniere, 2 Mason C. C. 244; Wood v. Sparks, 1 Dev. & Bat. 389; Jackson v. Given, 16 Johns. 170; Burr v. Sim, 1 Whart. 266; Coykendall v. Rutherford, 1 Green. Ch. 360; Robinson v. Gaines, 2 Humph. 367; Warden v. Richards, 11 Gray, 278; Belmont v. O'Brien, 12 N. Y. 400.

<sup>2</sup> Crewe v. Dicken, 4 Ves. 97; Granville v. McNeile, 7 Hare, 156; Smith v. Wheeler, 1 Vent. 138; Hawkins v. Kemp, 3 East, 410; Cooke v. Crawford, 13 Sim. 96; Nicholson v. Wordsworth, 2 Swanst. 369; Adams v. Taunton, 5 Mad. 435; Sands v. Nugee, 8 Sim. 130; Bonifant v. Greenfield, Cro. Eliz. 80; S. C. 1 Leon, 60; Bayley v. Cumming, 10 Irish Eq. 410; Zebach's Lessee v. Smith, 3 Binn. 69; In the Matter of Stevenson, 3 Paige, 420; Chanet v. Villeponteaux, 3 McCord, 29; Niles v. Stevens, 4 Denio, 402; Leggett v. Hunter, 19 N. Y. 456.

<sup>3</sup> Hertell v. Bogart, 9 Paige, 57; Simpson v. Gutteridge, 1 Madd. Ch. 609; Saunders v. Saunders, 2 Litt. 315.

<sup>4</sup> 2 Redfield on Wills, 206; Bryan's Ex. v. Thompson's Adm. 6 J. J. Marsh. 586.

same manner as if it had been given to them as trustees under an ordinary trust; and the concurrence of all the trustees is necessary to transfer the legal title."<sup>1</sup> Where executors are charged with the execution of a power coupled with an interest, the tenure of their holding is like that of ordinary trustees having a similar power. They take and hold as joint-tenants.<sup>2</sup> If some renounce, those who accept take the whole as if they only had been named; and if one of those accepting die, the survivor succeeds to the interest and executes the power with which it is coupled. If co-executors take a residue in that character, they become joint-tenants with the right of survivorship.<sup>3</sup>

<sup>1</sup> *Hertell v. Bogart*, 9 Paige, 58; *Smith v. Whiting*, 9 Mass. 334.

<sup>2</sup> *Perry on Trusts*, sec. 414.

<sup>3</sup> *Frewen v. Relfe*, 2 Bro. C. C. 220; *Baldwin v. Johnson*, 3 Bro. C. C. 455; *Griffiths v. Hamilton*, 12 Ves. 298; *White v. Williams*, 3 V. & B. 72; *Knight v. Gould*, 2 Mylne & K. 299, 303; *Flanders v. Clarke*, 3 Atk. 509; S. C. 1 Ves. Sr. 9. •

## CHAPTER III.

### THE HOMESTEAD AS A JOINT-TENANCY.

Revival of Joint-Tenancy by Homestead Laws, § 47.

In California, Nevada, and Idaho, § 48.

Resembles Tenancy by Entireties, § 49.

General Nature of Homestead Estates, § 50.

Homestead not ordinarily a Cotenancy, § 51.

Interest of Wife when Homestead is not a Cotenancy, § 52.

Interest of Wife how regarded in Iowa, § 53.

Homestead in Lands of a Cotenancy, § 54.

Homestead may be acquired in any title or interest in Severalty, § 55.

Homestead embraces Title subsequently acquired, § 56.

Homestead embraces Title subsequently acquired, § 57.

Conveyance or Incumbrance of, § 58.

Limit of, § 59.

Partition of, § 60.

After Divorce, § 61.

Survivorship in, § 62.

#### § 47. Joint-Tenancy revived by Homestead Laws.—

In most of the States, laws have been enacted exempting from execution and forced sale a certain quantity of land, with the improvements thereon, used and occupied by the judgment debtor as a home for himself and family. Usually, the property so exempted is further secured as a home for the family by provisions requiring the joint concurrence of the husband and wife in its encumbrance or alienation. At the death of the husband, the property retains its homestead character for the benefit of his widow and children. In the States where these enactments have been made, the property by them protected from seizure and forced sale, and consecrated as a home, is spoken of as a homestead, and the new interest created by law in this property is known as the homestead estate. While joint-tenancy, as it existed under

the common law, has, by operation of statutes in most of the States, fallen into general desuetude, it has, in some others, been annexed as an incident to every estate held by husband and wife as a homestead. In those States, the importance of the law of joint-tenancy has been partially revived. For as a very large proportion of property is dedicated as homesteads, it therefore happens that joint estates are of frequent occurrence—more frequent perhaps than when joint-tenancy was most favored at common law. We shall therefore proceed to consider the homestead as a *cotenancy*; but only so far as to show in what States it is treated as a new and joint estate, and what, where it is so treated, are the peculiar relations and powers of the cotenants thereof.

§ 48. In California, the tenure by which husband and wife hold their homestead is clearly defined. Section one of the Homestead Act of that State, as amended in 1860, provided that, from and after the filing and recording of the declaration, “the husband and wife shall be deemed to hold said homestead as joint-tenants; and all homesteads heretofore appropriated and acquired by husband and wife under the act to which this is amendatory, shall be deemed to be held by such husband and wife in joint-tenancy.”<sup>1</sup> The provisions of this section were adopted as part of the homestead law of the State of Nevada,<sup>2</sup> and of the Territory of Idaho.<sup>3</sup> The Civil Code of California reenacted the substance of the former statute, leaving the present law of that State, upon this subject, in the following form: “From and after the time the declaration is filed for record, the land therein described is a homestead; and if the declaration was made by a married person, the land is thereafter by the spouses held in joint-tenancy, and on the death of either of the spouses, and subject to no other liability than such as exists or has been created under the provisions of this title, at once vests in the survivor.”<sup>4</sup>

§ 49. Resembles Tenancy by Entirety.—In the Territory and States named in the preceding section, the homestead

<sup>1</sup> Hittell Gen. Laws, sec. 3541; St. 1860, 311. <sup>2</sup> Comp. Laws, Nev., 60-61; St. 1865, 225.

<sup>3</sup> Gen. Laws Idaho, 1863-4, 575.

<sup>4</sup> Sec. 1265 Civil Code.

is not only inseparably connected with survivorship—the most important characteristic of joint-tenancy—but it is also given a name, and is by statute expressly denominated a joint-tenancy. As a conveyance or incumbrance cannot be made to affect the homestead without the assent of both husband and wife, manifested in form and manner as provided in the act, and as neither can prejudice the estate of the other, nor change the form of the tenancy, nor, during the continuance of the marital relations, turn the cotenancy into an estate in severalty by a suit for partition, it appears to us that these legislators have not given the most appropriate name to the tenancy created; and that, instead of a joint-tenancy, it should be termed a tenancy by entirety.

§ 50. In considering the Nature of the Homestead Estate, Chief Justice Sawyer, of California, said: “There is no occasion to discuss at large the question whether the estate of the husband and wife is exactly the same in all respects, and with all the incidents of a joint-tenancy, in the technical sense of the term, as used in the common law, or, whether the term ‘joint-tenancy’ is the best that could be chosen to express the intention of the legislators. But we do not see why the character of the right, as defined, does not *substantially* approach very near a joint-tenancy, although not created in precisely the same way, even if not a technical joint-tenancy at common law. In the homestead estate, most of the unities of a joint-tenancy are found, for it is created by the same instrument and at the same time. So far as the homestead right is concerned, ‘they have one and the same interest, accruing by one and the same conveyance, (or act,) commencing at one and the same time, and held by one and the same undivided possession.’ If the husband controls the property during coverture, it is not because he has a greater, more valuable, or different interest in the homestead from that of the wife, but because the law has made him the head of the household and devolved upon him the duty of management, not for his own interest merely but for the joint benefit of both. And since the amendment of 1862, the right of survivorship, the grand incident of joint-tenancy, is added. The main substantial difference now, seems to be the want of

power in one of the parties to sever the tenancy, or convey at all, without the concurrence of the other in the mode prescribed. But however this may be, there is a joint interest in the homestead—a joint *holding*, if not a *technical joint-tenancy*. The Legislature did not adopt the provision, that the husband and wife shall be deemed to hold the homestead as ‘joint-tenants,’ without some object, and the term ‘joint-tenants’ was used as best adapted to express that object. They did not intend to use a meaningless phrase, to be attended by no consequences.”<sup>1</sup>

§ 51. **Homestead not ordinarily a Cotenancy.**—In a vast majority of the States in which homestead property is recognized and protected from forced sale, no joint-tenancy is, in express terms, created. Still a kind of joint interest is generally brought into being; alienation is usually restricted to some form of conveyance manifesting the joint assent of the spouses; and upon the death of either spouse, the estate remains exempt from execution, and generally vests in the survivor alone, or in the survivor and the children, if any, of the deceased. Practically, the interest of the wife in the premises dedicated as a homestead, under such laws, is as great as that of the husband. Her power of disposition, during the continuance of the homestead, is coëxtensive with his. But while her interest in, and disposing power over, the property is thus in fact at least equal to his, the authorities generally concede that she has *no estate* in the homestead, in addition to what she may have independent of the fact of homestead. In other words, *the title* continues in the husband, subject to certain restraints and privileges, and liable to a certain disposition after his death.

§ 52. **The interest or title of the wife in the homestead,** even where, under the law, no cotenancy was created, has, however, been in some instances treated as a title in and to the lands included in the homestead. This was the case under the decisions made at an early day in California,<sup>2</sup> declaring that the operation of the homestead law was to “create

<sup>1</sup> Barber v. Babel, 36 Cal. 16; McQuade v. Whaley, 31 Cal. 531.

<sup>2</sup> Taylor v. Hargous, 4 Cal. 273; Poole v. Gerrard, 6 Cal. 71; Buchanan's Estate, 8 Cal. 509; Revalk v. Kraemer, 8 Cal. 73; Tompkins' Estate, 12 Cal. 125.

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a sort of joint-tenancy." These decisions, it must be remembered, were made before the adoption of the amendment by which homesteads were converted into joint-tenancies. They were subsequently overruled, Field, then Chief Justice, delivering the opinion of the Court, in the course of which he said, after referring to the doctrine of the earlier cases: "This doctrine has never met with the approbation of the profession, and is not warranted by any language in the constitution or the statute. There is nothing in the nature of the homestead right or privilege which justifies its designation as such an estate. The right or privilege has no single feature resembling a joint-tenancy. The estate rests where it existed before the premises were appropriated as a homestead. The appropriation of them confers a right upon the wife to insist that their character as a homestead shall continue until she consents to the alienation, or another homestead is provided, or they are otherwise abandoned. The wife, if surviving her husband, takes the homestead, not by virtue of any right of survivorship arising from the alleged joint-tenancy, but as property set apart by law from her husband's estate, for her benefit and that of her children, if any. In the same way, other property exempt from forced sale is set apart to her."<sup>1</sup> The view of the law thus taken by Judge Field is consistent with decisions in other States. Thus, in Illinois the Supreme Court has held that the homestead act has not created any new estate, separate and distinct from the fee or other estate. And that, as a consequence, the conveyance of the husband operates upon and transfers the fee, subject to the homestead rights of the wife; and that as soon as the homestead rights terminate, the grantee of the husband is entitled to possession of the property as owner thereof.<sup>2</sup>

<sup>1</sup> *Gee v. Moore*, 14 Cal. 472; *Bowman v. Norton*, 16 Cal. 217; *Brennan v. Wallace*, 25 Cal. 114.

<sup>2</sup> *McDonald v. Crandall*, 43 Ill. 236; *Hewett v. Templeton*, 48 Ill. 369; *Stewart v. Mackey*, 16 Tex. 57; *Davis v. Andrews*, 30 Vt. 681; *Gunnison v. Twitchell*, 38 N. H. 62; *Folsom v. Carli*, 5 Minn. 837. But in *Kerley v. Kerley*, 13 Allen, 287, it is said that "the right of homestead is a new species of estate, created by statute, and not known to the common law. But it seems to have all the incidents of a freehold estate, and to come within the definition given by elementary writers. It is an estate indeterminate in its duration, and which may continue for the joint lives of the possessor and his wife. That it is defeasible, does not change the quantity of the estate while it continues." See also *Silloway v. Brown*, 12 Allen, 30.



§ 53. In Iowa, the inclination seems to be to regard the homestead as in the nature of a joint-tenancy. A statute of that State authorizes the real property of a married woman to be redeemed from tax sale at any time within one year after the removal of the disability of coverture. Under this statute, a wife claimed the right to redeem the homestead; and was resisted on the ground that the homestead was not her real property. But the Court allowed her claim, upon the following grounds: "The right of the wife to the homestead of the husband, and her interest in it, are present, fixed, and substantial: they are not merely possible, remote, or contingent. Her rights and interests are in possession and enjoyment, and not merely in expectancy or dependent. The husband and wife are, as to the homestead, practically, joint-tenants, subject to certain limitations for the benefit of children, etc. The husband cannot alienate the homestead, nor even his own interest in it, except the wife concur in signing the conveyance. Can it be said that she has no 'interest in' that, the present possession of which she enjoys, the title to which cannot be imparted without her consent, and the alienation of which can only be done by her joining in the conveyance?"<sup>1</sup>

§ 54. Whether Homestead Rights can attach to an undivided interest in lands, in the absence of an express provision of the statute to that effect, is a question on which the Judges have not agreed. On the one hand, it has been thought that the provisions of the homestead law contemplated that the interest to which they should be applied should be susceptible of an enjoyment in severalty. When the value of the land claimed exceeds in amount the limit of the homestead right, the statute provides means by which the homestead may be segregated; and that, as segregated, it may be set off to the judgment debtor. No such segregation could take place when the interest of the claimant was in a moiety only, for, in that case, there is no place which he can lawfully take into his exclusive possession. For these reasons, the claim of a cotenant to a homestead has been denied in many

<sup>1</sup> Adams v. Beale, 19 Iowa, 67; Chase v. Abbott, 20 Iowa, 151.

of the cases in which it has been questioned.<sup>1</sup> In California, the doctrine that a homestead could not be acquired in undivided property was frequently enforced, and was applied in some extreme cases. In one instance, the lands attempted to be dedicated as a homestead belonged to the husband and wife and their child as tenants in common. The Court could see no distinction between this case and one in which the cotenants were entire strangers to each other.<sup>2</sup> In another instance, the homestead had been acquired under a conveyance purporting to convey the same in severalty, and was acquired and held under the claim and belief, on the part of the occupant, that he was the sole owner. The Court could not understand that these facts authorized any exception to the general rule.<sup>3</sup> And where, when acquired, the homestead was held in severalty, the conveyance of an undivided interest, because it turned the homestead into a cotenancy, was deemed an abandonment of the homestead.<sup>4</sup> On the other hand, in several of the States, a homestead claim upon an undivided interest has been sustained, and all distinction, in this respect, between estates in severalty and estates in cotenancy denied.<sup>5</sup> In California, the State in which the claim of a cotenant to exemption was first denied, the Legislature so changed the statute that a part owner could hold as a homestead lands of which he was in the exclusive possession.<sup>6</sup> But we see no sufficient reason, even in the absence of statutes directly bearing upon the subject, for holding that a general homestead act does not apply to lands held in cotenancy. The fact that a homestead claim might savor of such an assumption of an exclusive right as is inconsistent with the rights of the other cotenant, and that the maintenance of such claim might interfere with proceedings for partition,

<sup>1</sup> *West v. Ward*, 26 Wis. 580; *Wolf v. Fleischacker*, 5 Cal. 244; *Elias v. Verdugo*, 27 Cal. 418; *Reynolds v. Pixley*, 6 Cal. 167; *Kellersberger v. Copp*, 6 Cal. 565; *Bishop v. Hubbard*, 23 Cal. 517; *Ward v. Hahn*, 16 Minn. 161; *Thurston v. Maddocks*, 6 Allen, 429; *Kingsley v. Kingsley*, 39 Cal. 665.

<sup>2</sup> *Giblin v. Jordan*, 6 Cal. 417.

<sup>3</sup> *Seaton v. Son*, 32 Cal. 483.

<sup>4</sup> *Kellersberger v. Kopp*, 6 Cal. 565.

<sup>5</sup> *Horn v. Tufts*, 39 N. H. 483; *Thorn v. Thorn*, 14 Iowa, 53; *McClary v. Bixly*, 36 Vt. 254; *Greenwood v. Maddox*, 27 Ark. 660; *Robinson v. McDonald*, 11 Tex. 385.

<sup>6</sup> St. of 1868, 116.

form no very satisfactory reason for denying the exemption. If the rights of the other cotenant are threatened or endangered, he alone should be permitted to call for protection and redress. The law will not sanction any use of the homestead in prejudice of his rights. But as long as *his* interests are respected, or so nearly respected that *he* feels no inclination to complain, why should some person having no interest in the cotenancy be allowed to avail himself of the law of cotenancy for his own, and not for a cotenant's gain? The homestead laws have an object perfectly well understood, and in the promotion of which Courts may well employ the most liberal and humane rules of interpretation. This object is to assure to the unfortunate debtor, and his equally unfortunate but more helpless family, the shelter and the influence of HOME. A cotenant may lawfully occupy every parcel of the lands of the cotenancy. He may employ them not merely for cultivation or for other means of making profits, but may also build houses and barns, plant shrubs and flowers, and surround himself with all the comforts of home. His wife and children may, of right, occupy and enjoy the premises with him. Upon the land of which he is but a part owner, he may, and in fact he frequently does, obtain all the advantages of a home. These advantages are none the less worthy of being secured to him and his family in adversity, because the other cotenants are entitled to equal advantages in the same home. That he has not the whole, is a very unsatisfactory and a very inhumane reason for depriving him of that which he has.

§ 55. **Holds whatever Title Claimant has.**—The legislators who enact homestead laws are, no doubt, chiefly intent upon protecting the debtor and his family, regardless of the title by which the homestead is held. Such as it is, the family is entitled to retain it. Whether it be an estate in fee-simple, free from incumbrances, or an estate of less dignity and value, or a mere possessory interest,<sup>1</sup> as long as the debtor can occupy it as a home, the creditor should not be allowed to take it under his execution. The object of the

<sup>1</sup> Brooks v. Hyde, 37 Cal. 373.

homestead law is to protect *the possession*. It applies as well to possession held under an equitable as under a legal title.<sup>1</sup> "Whether the debtor held in fee-simple absolute, for life or for a term of years, the reason for applying the exemption exists with equal force."<sup>2</sup> The possession of land held under a contract to purchase may be subjected to a homestead claim. If so claimed, the husband cannot dispose of it without the assent of the wife, and if he refuse to complete his purchase, she should be permitted to do so for the protection of her interest.<sup>3</sup>

§ 56. **Title acquired after filing a declaration of homestead** is also protected from forced sale, and seems to become an inseparable part of the homestead estate. In California, a declaration of homestead was filed by one in possession, the fee being then in a stranger. Afterwards, prior to the sale under execution, but subsequently to the docketing of a judgment against him, the claimant became the owner of the fee. The purchaser at the sheriff's sale brought an action to recover possession. In determining that this action could not be sustained, the Court justified its decision by the following train of reasoning: "At the time the judgment was docketed and became a lien, the premises constituted the homestead of the defendant, as against everybody but the owner of the land. There is no question made as to its being a homestead, if a party having a naked possession only, the title being in a stranger, can acquire a homestead right in the land so possessed. The statute does not specify the kind of title a party shall have to enable him to secure a homestead. It says nothing about title. The homestead right given by the statute is impressed on the lands to the extent of the interest of the claimant in it—not on the title merely. The actual homestead, as against everybody who has not a better title, becomes impressed with the legal homestead right by taking the proceedings prescribed by statute.

<sup>1</sup> Tomlin v. Hilyard, 43 Ill. 300; McCabe v. Mazzuchelli, 13 Wis. 481.

<sup>2</sup> Blue v. Blue, 38 Ill. 18; Johnson v. Richardson, 83 Miss. 463; Pelan v. De Bevard, 13 Iowa, 53; McClurkin v. McClurkin, 46 Ill. 327; Conklin v. Foster, 57 Ill. 104; Colwell v. Carper, 15 Ohio, 279.

<sup>3</sup> McKee v. Wilcox, 11 Mich. 360; but see Farmer v. Simpson, 6 Tex. 310.

The estate or interest of the occupant, be it more or less, thereby becomes exempt from forced sales on execution, and can only be affected by voluntary conveyances or relinquishment in the mode prescribed. The land in this instance, as to everybody having no superior title, became the homestead of the defendant, for all the purposes of protection against forced sale and voluntary conveyance in any other manner than the statutory mode, as effectually as if the defendant had held the title in fee-simple. There was nothing which the sheriff was authorized to sell under execution. The fact that the defendant, after the attaching of the homestead right, acquired the true title from a stranger, does not affect the question. This did not vitiate the homestead right which had attached to the land, and given an independent estate not subject to execution. The title so acquired cannot be considered as a thing separate and apart from the land subject to sale and conveyance, in the hands of the homestead claimant, so as thereby to affect the homestead right. By filing the declaration, the party indicates his intention to make the land his homestead, and if he afterwards acquire an outstanding title, it attaches itself to the homestead already acquired and perfects the homestead right. If it were otherwise, a homestead could not be secured which would be safe against forced sales, unless there was at the time a perfect title in fee-simple in the party who seeks the homestead right. In case of a title in any respect imperfect, the claimant could not perfect his title to his homestead, except at the risk of losing it altogether, through the intervention of a creditor, and by the very means adopted to render it more secure; and under such a construction of the statute, it would not be available to the greater portion of the class in this State who need it most."<sup>1</sup>

§ 57. **After-acquired Title.**—In the case referred to in the preceding section, the contest was between the claimant on one hand seeking to retain the benefit of the new acquisition by attaching it to the homestead estate, and the creditor, on the other hand, seeking to obtain and assert the new title

<sup>1</sup> Spencer v. Geissman, 37 Cal. 99.

by treating it as independent of the homestead. This feature of the case seems to have strongly impressed the Court, and to have contributed materially to the success of the defendant. But suppose that the question had arisen between the heirs of the claimant upon the one hand and his widow on the other. Could she maintain that the title acquired subsequently to the declaration of homestead was also held in joint-tenancy, and that she, as survivor, had succeeded to the newly-acquired as well as to the original title? We think this question must be answered in the affirmative. The joint-tenancy created by the dedication of the premises as a homestead is a tenancy in the *homestead itself*, and not in any specified title thereto; and this dedication, like a conveyance in fee with covenants of general warranty, seems to carry to the beneficiaries all interests thereafter acquired, and to consecrate those interests to the further perfection of the homestead right. The moment that the new acquisition becomes so attached to the homestead as to be safe from the creditors of the claimant, it must be deemed a part of the joint-tenancy; for the statute does not contemplate that any homestead interest should be free from the right of survivorship.

§ 58. The conveyance, incumbrance, or other act of the husband alone, cannot, while the premises continue to be a homestead in fact, destroy or diminish the wife's right of homestead.<sup>1</sup> When the fee of the premises remains in the husband subject only to the homestead rights of the wife, no doubt his conveyance passes the fee, but leaves it as before subject to the same right. The joint-tenancy held by the husband and wife, and created by the dedication of the premises as a homestead, is incapable of being destroyed, severed, alienated, or incumbered during the continuance of the marital relations. Nor can either keep alive or renew an incumbrance. After the filing of the declaration of homestead, the husband cannot prolong an existing mortgage or other charge upon the premises by giving a new note for the

<sup>1</sup> Clark v. Shannon, 1 Nev. 568; Goldman v. Clark, 1 Nev. 607; Marshall v. Barr, 35 Ill. 106; Dye v. Mann, 10 Mich. 291; Williams v. Swetland, 10 Iowa, 51; Alley v. Bay, 9 Iowa, 509; Yost v. Devault, 9 Iowa, 60.

same indebtedness for the security of which such mortgage was given or such charge established.<sup>1</sup>

§ 59. The limit of the homestead is sometimes fixed at a certain quantity of land, and sometimes at a certain value. In California, the homestead character cannot be at any one time impressed upon property of greater value than five thousand dollars. The joint-tenancy created by law in the homestead is liable to fluctuate in quantity to correspond with the fluctuation in value of the land, whereby it may sometimes exceed the statute limit, and at other times be exceeded by it. If at the time of filing the declaration the premises are of less value than five thousand dollars, they become a homestead, and so remain until their increasing value passes the statutory limit. The excess beyond this limit is free from the homestead character.<sup>2</sup> But if the increased value should not be permanent, no doubt the whole premises would again become homestead as soon as their value shrank to the statutory limit. "The homestead and the tests by which it is ascertained are the same, whether the question arises between those claiming the homestead, or one of them and a vendee, a mortgagee, a creditor, or the heirs of the deceased husband or wife. There is not one homestead as against a creditor, and a different one when the survivor asserts his or her claims as against the heirs of the deceased. At its inception, it is limited to five thousand dollars in value, and when the property is enhanced in value so that it exceeds the statutory limit, the excess does not constitute a part of the statutory homestead. After the premises are worth five thousand dollars, every increase of value works a reduction in the area of the homestead, until a point is reached when it cannot be further cut down and leave a homestead of the value of five thousand dollars without material injury, and, after that point is reached, no part of the premises constitute a statutory homestead, but the value or proceeds of the premises, to the extent of five thousand dollars, has the benefit of the exemption from forced sale." It follows, from the views expressed in the preceding quotation,

<sup>1</sup> Barber v. Babel, 36 Cal. 17.

<sup>2</sup> Gregg v. Bostwick, 33 Cal. 225.



that the right of survivorship cannot exceed the statutory limit of value, and that, after the death of either claimant, the survivor succeeds only to so much of the homestead as, immediately preceding the death of the other cotenant, did not exceed five thousand dollars in value.<sup>1</sup>

§ 60. The homestead right cannot be partitioned against the objection of the surviving wife, on the application of the other heirs, and after the decease of the husband. She has the right, at least as long as she resides on the premises with her family, or with any minor children of the family, to occupy and enjoy the whole homestead. The heirs cannot curtail this right by compelling her to submit to a partition of the premises, and to confine her subsequent enjoyment to the portion assigned to her.<sup>2</sup> But where it is claimed that the premises embraced in the homestead declaration, at the death of the husband, exceeded in value the limit provided by statute, the widow must submit to such proceedings as may be necessary to segregate her homestead tract or interest from the more valuable tract embraced in the declaration.

§ 61. After a divorce of the spouses, a variety of questions may arise in reference to the effect of this dissolution of the marital relations upon the homestead right. Does the homestead still retain its character, and if so, for whose benefit? So far as creditors are concerned, a decided majority of the authorities affirm that the creditors have no right to seize upon the homestead, even after a divorce, as long as the owner is the head of a family and continues with his family to use it as his home.<sup>3</sup> Where the wife obtains a divorce, and the children are awarded to her, she, in Illinois, is regarded as the head of the family, and as such is entitled to the benefit of the homestead.<sup>4</sup> But it seems that the husband, if continuing in possession of the homestead, is still entitled to all

<sup>1</sup> Estate of Delaney, 37 Cal. 176; Rich v. Tubbs, 41 Cal. 36.

<sup>2</sup> Dodds v. Dodds, 26 Iowa, 311; Hoffman v. Newhaus, 30 Tex. 633; Nicholas v. Purcell, 21 Iowa, 265.

<sup>3</sup> Blue v. Blue, 38 Ill. 19; Redfern v. Redfern, 38 Ill. 509; Byers v. Byers, 21 Iowa, 268.

<sup>4</sup> Vanzant v. Vanzant, 23 Ill. 536; Bonnell v. Smith, 53 Ill. 383. See also Tiemann v. Tiemann, 34 Tex. 524.



the protection of the homestead act. In discussing this question, the Supreme Court of Iowa, quite recently, said: "It is true his divorced wife was awarded the custody of the only child, and the Court decreed that she should maintain it without charge to the defendant. But this decree does not exonerate him from liability to support the child, in the event of the inability of the mother to do so. It seems fully to accord with the provisions of the homestead law that the exemption should last as long as his liability to support exists, provided he continue in actual occupation of the property. Besides, the provisions of the homestead law are intended for the benefit of the children as well as of the parents. It does not accord with the spirit of the humane provisions of the statute, that the divorcing of the wife and awarding to her of the children, should deprive them of all interest in the homestead property."<sup>1</sup> In the States where by law the dedication of the premises as a homestead changes the tenure by which the land is held, the question must, it would seem, frequently arise as to the effect of a divorce upon the joint-tenancy by which the homestead had been held. Do the premises revert to their former condition as to title? If before the separate property of one of the spouses, do they return to that state? or do they continue as joint property and become liable to partition between the former consorts? If the premises were community property, and no disposition is made of them in the decree, are they still a homestead? and if so, whose? The Supreme Court of the State of California has very recently considered the effect of a decree of divorce, and has determined that when accompanied by a partition of the property, it destroys the homestead character as effectually as a declaration of abandonment could do, if duly executed by both parties. This decision seems to be in direct conflict with the adjudications made in other States, and already cited and referred to in this section, in so far as it declares that the divorce renders the property at once liable to be seized upon execution. But, so far as it determines the effect of the divorce upon the *joint-tenancy*, this decision is, as far as we can ascertain, the only authority bearing upon the subject.

<sup>1</sup> Woods v. Davis, 34 Iowa, 265. See to same effect Doyle v. Coburn, 6 Allen, 73.

We therefore regard it as sufficiently novel and important to justify its insertion in full in this place. It is as follows: "Block No. 127, in the town of Santa Barbara, which includes the premises in controversy, became in 1871 the homestead of the plaintiff and his wife, and so continued up to the time when they were divorced, by a decree of the District Court, in July, 1873. The decree directed the homestead property to be equally divided between the husband and wife, and the Commissioners having made and reported a partition, the Court confirmed the same, and adjudged that the respective portions allotted to each be held by them respectively, free and clear of all claims by or on the part of the other, the property in controversy being allotted to the plaintiff. Prior to the divorce, Chalfant, one of the defendants, recovered a judgment against the plaintiff in this action, and, after the decree of divorce was rendered, caused the premises in controversy to be levied upon under an execution issued on his judgment. The question presented is whether the premises in controversy remained the homestead of the plaintiff after they were allotted to him by the decree of divorce. The decree severed the sort of joint-tenancy of the parties in the homestead premises, which had been created by the homestead declaration, the residence of the parties, etc., under the provisions of the homestead act. It also destroyed the right of survivorship. The joint deed of both parties is no longer essential for the alienation or abandonment of any portion of the premises. The family, for whose benefit the provisions of the homestead act were mainly designed, was severed by the decree, and neither the husband nor the wife is entitled to reside on that portion of the homestead premises which was allotted to the other. All the principal qualities of the homestead estate, except that of liability for debts, etc., having been destroyed by the decree, the latter, in our opinion, was also destroyed. The decree was as effectual in its results as would have been a declaration of abandonment. It results from these views that the portion of the property which was allotted to the plaintiff was liable to execution for the payment of his debts.."¹ But it is evident that in this

¹ Shoemaker v. Chalfant, filed March 18, 1874.

decision much stress is laid upon the fact that the decree had directed a partition of the property, and that this direction had been fully executed by allotting a specified part of the homestead to each of the late spouses. Had no such partition been made, both husband and wife would still have been entitled to occupy every part of the homestead premises, their joint deed would still have been requisite to transfer the title thereto in severalty; and it is possible that with these circumstances in view, the Court would have reached a different conclusion as to the liability of the lands to seizure under execution. This opinion contains the general statement that the decree severed the joint-tenancy. But whether this severance was produced by that portion of the decree destroying the marital relations of the parties, or by the portion allotting to each a parcel of the land to be held in severalty, does not clearly appear in the opinion. However, as this latter part of the decree, especially when carried into effect by an actual partition, was sufficient to transform the cotenancy into two estates in severalty, it is most probable that the general language employed by the Court was not designed as an expression of its opinion upon the effect of a divorce upon the joint-tenancy formerly existing between the spouses, unless the decree of divorce was followed by a partition of the homestead property.

§ 62. **Survivorship** is the grand incident of joint-tenancy. In most of the States, as we have seen, the homestead is not a new estate. It does not change the title, but merely subordinates it to the interests of the family. In these States, as the title during the life of the claimant was not altered by the homestead law, so, after his death, it descends to his heirs as it would have done independent of its homestead character. But though thus descending to the heirs, it is held by them, as it was held by their ancestor, subject to the homestead right of the wife and minor children.<sup>1</sup> In some of the States, the wife, or the wife and children, upon the decease of the claimant, become the absolute owners of the

<sup>1</sup> *Size v. Size*, 24 Iowa, 580; *Meador v. Place*, 43 N. H. 307; *Meyer v. Meyer*, 23 Iowa, 359; *Bassett v. Messner*, 30 Tex. 604; *Cotton v. Wood*, 25 Iowa, 43; *Hamblin v. Warnecke*, 31 Tex. 91; *Burns v. Keas*, 21 Iowa, 257.

homestead.<sup>1</sup> But this is not the result of the right of survivorship, but of provisions regulating the descent of the claimant's estate. But where, as in California, Idaho, and Nevada, a homestead is a joint-tenancy, of which husband and wife are the cotenants, the doctrine of survivorship is given its full effect, and the homestead vests fully and absolutely in the survivor. As in the case of joint-tenancy at common law, the title of the survivor is paramount to the claims of the children and other heirs of the deceased.<sup>2</sup> This feature of the homestead law seems well calculated to thwart a portion of the design of every claimant in filing his or her declaration of homestead. This design is as much to secure a home for the children as for the parents. But when either parent dies, and the children are, more than ever before, in need of the advantages of home, the principle of survivorship leaves them no interest in the homestead, and makes them mere tenants by sufferance where they ought to be claimants by right.

<sup>1</sup> See Comp. Laws Kansas, p. 392, sec. 2.

<sup>2</sup> Wixom's Estate, 35 Cal. 320; Rich v. Tubbs, 41 Cal. 34.

## CHAPTER IV.

### TENANCY BY ENTIRETIES.

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Cases holding they can take by Moieties, § 72.

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§ 63. **Definitions.**—"An estate by entireties arises on a gift to two persons being, at the time the gift *takes effect*, husband and wife."<sup>1</sup> "A tenancy by entireties is peculiar," says Mr. Preston, "to a gift to two persons being, at the time the gift takes effect, husband and wife."<sup>2</sup> Why the two celebrated and very accurate writers from whose works the preceding quotations have been made ever spoke of an estate by en-

<sup>1</sup> Jickling on Anal. L. & Eq. Estates, 252.

<sup>2</sup> 2 Preston on Abstracts of Title, 39. The same author, in his work on estates, gives a more complete definition. "Tenancy by *entireties* is when husband and wife take an estate to themselves jointly, by grant or devise, or limitation of use, made to them *during coverture*, or by grant, etc., to them, which is *in fieri* at the time of their marriage, and completed, by livery of seisin or attornment, during the coverture." "The husband and wife have not either a joint estate, a sole or several estate, nor even an estate in common. From the unity of their persons by marriage, they have the estate entirely as one individual, and on the death of one of them, the entire tenement will, for all the estate of which they are seized in this manner, belong to the survivor, without the power of alienation or forfeiture of either alone, to prejudice the right of the other." (1 Preston on Estates, 131.)

tireties as though its only origin was by gift, is altogether unaccountable. Mr. Jickling, on the very next page after giving the definition first quoted, speaks of estates acquired by husband and wife *on a purchase by them both*, evidently using the word *purchase* in a sense which did not include the idea of a gift. And certainly of the many cases upon this subject to be found in the reports, not one implies that this estate is necessarily founded upon a gift. A tenancy by entireties arises whenever an estate vests in two persons, they being, when it so vests, husband and wife.<sup>1</sup> It is not essential that they should be married when the grant or gift is made, if thereafter, when the gift vests, they are husband and wife. Hence, if a devise be made to a man and woman, and before the death of the testator they marry, or if a feoffment be made to them while they are single, of which livery is made after marriage; or if they recover on a voucher to warranty annexed to an estate of which they were joint-tenants—in all these cases, they take by entireties.<sup>2</sup>

§ 64. **Difference between Joint-Tenancy and an Estate by Entirety.**—A joint-tenancy is distinguished by four unities; a tenancy by entirety by five.<sup>3</sup> The former may be vested in any number of natural persons more than two; the latter can be vested in but two natural persons, and these two are regarded as but one in law. Joint-tenants take by moieties—each is seized of an undivided moiety of the whole: husband and wife take each an entirety, and are seized *per tout* but not *per my*. Joint-tenants may each alien his interest in the estate: husband and wife must alienate jointly. The former may sever their estates at pleasure: the latter hold an estate which, while it remains theirs, is inseverable. The former can have partition; but the latter cannot, unless indeed in a divorce proceeding severing their matrimonial rela-

<sup>1</sup> In this description of tenancy by entirety, we have excluded the idea that the tenancy must be created by gift or purchase. Though not ordinarily acquired by descent, this is so only because husband and wife rarely succeed to property as heirs of the same person. But, on so acquiring it, they are tenants by entireties. (Gillan v. Dixon, 65 Pa. S. 395.)

<sup>2</sup> Jickling Anal. L. & Eq. Estates, 252; Co. Litt. 187; Nicholls v. Nicholls, cited Vin. Abr. BABON & FEME; Plowd. Comm. 483.

<sup>3</sup> Topping v. Sadler, 5 Jones, 357.

tions. The former may succeed to his cotenant's moiety by right of survivorship, while upon the decease of either of the spouses, the other continues holding the entire estate.<sup>1</sup> "A conveyance to husband and wife creates neither a tenancy in common nor a joint-tenancy. The estate of joint-tenants is a unit made up of *divisible parts*: that of husband and wife is also a unit, but it is made up of *indivisible parts*. In the first case, there are several holders of different moieties or portions, and upon the death of either, the survivor takes a new estate. He acquires by survivorship the moiety of his deceased cotenant. In the last case, though there are two *natural* persons, they are but one person in *law*, and upon the death of either, the survivor takes no new estate. It is a mere change in the legal properties of the person holding, and not an alteration in the estate holden. The loss of an adjunct merely reduces the *legal* personage holding the estate to an individuality identical with the *natural person*. The whole estate continues in the survivor the same as it would continue in a corporation after the death of one of the corporators. This has been the settled law for centuries."<sup>2</sup> As tenancy by entirety is not noticed as a distinct tenancy in many standard works upon the common law, it may be insisted that it is but a species of joint-tenancy. The differences between the two already pointed out in this section, it seems to us, conclusively establish that they must be classified as independent cotenancies. But if our theory needs any further support, this support is found in the fact that all the English adjudications upon this subject, as well as all the earlier writers upon the common law, assert that husband and wife cannot, by any words of limitation, however well chosen for that purpose, *receive* an estate as *joint-tenants*.<sup>3</sup>

<sup>1</sup> Doe v. Garrison, 1 Dana, 35; Shaw v. Hearsey, 5 Mass. 521; Hemingway v. Scales, 42 Miss. 1; Taul v. Campbell, 7 Yerg. 333.

<sup>2</sup> Stuckey v. Keefe's Exrs. 26 Pa. 8. 399; Gibson v. Zimmerman, 12 Mo. 385; Simpson v. Pearson, 31 Ind. 1.

<sup>3</sup> See authorities considered and cited in § 71.

Mr. Ram, in his Outline of the Law of Tenancy and Tenure, treats of tenancy by entireties as a separate species of tenancy, but undertakes to prove that husband and wife are not tenants by entireties, but joint-tenants. "The position has been hazarded, that husband and wife, tenants by entireties, are joint-tenants. It should be observed, however, that this appears contrary to a received notion of tenancy by entireties, and this idea is sanctioned by the concurrence of opinion of writers of the

§ 65. **Tenancy by Entirety in the United States.**—The common law in regard to estates by entirety is at this day in force in the majority of the States of the American Union. It has not been abolished nor encroached upon by any of the statutes in reference to joint estates. From an inspection of those statutes, it will be discovered that quite a number of them contain exceptions showing that they do not apply to

first eminence. But that tenants by entireties are joint-tenants may be thought to follow from a consideration of the following points, in which the common joint-tenancy and a tenancy by entireties have a perfect agreement. If A grants to B and C 100 acres in joint-tenancy, he conveys to B and C to hold jointly. If A grants to D and E his wife 100 acres, (not to hold in common,) he conveys to D and E his wife jointly. B is a tenant, and C is a tenant. So, it is apprehended, D is a tenant, and E tenant. B with C, and C with B, are seized of the whole 100 acres; are seized *per tout*. B and C are jointly tenants to the *præcipe*. D and E are jointly tenants to the *præcipe*. Survivorship takes place between B and C. Survivorship takes place between D and E.

“In these points, there appears not a shade of difference between the tenancy of B and C, and the tenancy of D, and E his wife. B and C are joint-tenants; then why are not D and E? That which distinguishes a tenancy by entireties from a common joint-tenancy is this: that tenancies by entireties are not seized *per my*. They are seized *per tout* only. But because they are not seized *per my*, does it follow they are not joint-tenants? The common joint-tenants are seized *per my*; but would they be less joint-tenants if not seized *per my*? What is it that constitutes a joint-tenancy? A joint seisin *per tout*. It is not a seisin *per my* which makes a joint-tenancy. Without that, the common joint-tenants would still be joint-tenants. Because tenants by entireties are not seized *per my*, is surely no reason to make them not joint-tenants. A learned writer says, tenants by entireties have not either a joint estate, a sole or several estate, nor even an estate in common. With great submission, it may be contended that the *joint-estate* is precisely the estate which they have. The estate of tenants by entireties is more a joint-estate than the estate of common joint-tenants; for whereas the common joint-tenants are seized *per my et per tout*, tenants by entireties are seized *per tout only*. If tenants *per my et per tout* have a joint estate, a fortiori tenants *per tout* have.” After thus reasoning to demonstrate that husband and wife are joint-tenants, Mr. Ram argues that they are not tenants by entireties, because if they are to be regarded as one person in law, the act of one is the act of both; the mind of one the mind of both; and the conveyance of one the conveyance of both; whereas, the estate acquired during coverture by husband and wife cannot be transferred or prejudiced without the assent of *both*; and he concludes his description of this tenancy as follows: “If the persons of these tenants are one, there seems to be an inconsistency in calling them tenants by entireties. One person can have but one seisin, one entirety. The view taken of a tenancy by entireties is shortly this:

“That the husband and wife are joint-tenants.

“That their tenancy is a species of joint-tenancy.

“That like other joint-tenants, they are seized *per tout*.

“But unlike other joint-tenants, they are *not* seized *per my*.

“As seized *per tout*, that their persons are *several*.

“As not seized *per my*, but *one* only.

“That they are joint-tenants and tenants by entireties, because each is seized *per tout*.

“That they are *called* tenants by entireties to distinguish them from the joint-tenants seized *per my et per tout*.” (Ram’s Tenure and Tenancy, 170-4.)



estates granted or devised to husband and wife. But, independent of any express exceptions, they have been almost uniformly confined in their operations to joint-tenancies. The reasons advanced for holding that estates by entirety are not included in these statutes are: 1st, the statutes apply to joint-tenancies only; 2d, they apply only to estates held by two or more, whereas estates by entirety are, in the eyes of the law, vested *in one person*; 3d, they apply to estates of which a severance can be made, while this estate of husband and wife is inseverable; and 4th, because the wrongs intended to be avoided by the statute arise from joint-tenancy alone; and 5th, because, while a joint-tenancy "is prejudicial to the Commonwealth and repugnant to the genius of Republics," tenancies by entirety are not. On account of the language of the statutes, in a few instances, but more frequently without any aid from the statutes, and because of the reasons already suggested, tenancy by entirety has been recognized in the States of Illinois,<sup>1</sup> Indiana,<sup>2</sup> Kentucky<sup>3</sup>, Maine,<sup>4</sup> Massachusetts,<sup>5</sup> Michigan,<sup>6</sup> Mississippi,<sup>7</sup> Missouri,<sup>8</sup> North Carolina,<sup>9</sup> New York,<sup>10</sup> New Jersey,<sup>11</sup> Pennsylvania,<sup>12</sup> Tennessee,<sup>13</sup> Vermont,<sup>14</sup> Virginia,<sup>15</sup> and Wisconsin.<sup>16</sup> In Upper Canada, a statute of 1834 enacted that all land granted to two or more

<sup>1</sup> *Mariner v. Saunders*, 5 Gilm. 124; *Lux v. Hoff*, 47 Ill. 427.

<sup>2</sup> *Davis v. Clark*, 26 Ind. 424; *Arnold v. Arnold*, 80 Ind. 305; *Jones v. Chandler*, 40 Ind. 588.

<sup>3</sup> *Doe v. Garrison*, 1 Dana, 35; *Rogers v. Grider*, Ib. 242; *Moore v. Moore*, 12 B. Monr. 664; *Babbitt v. Scroggin*, 1 Duval, 274. By statute of this State, in force since 1850, husband and wife take as tenants in common, unless a right by survivorship is expressly provided for. (Genl. St. ed. of 1873, p. 531, sec. 18.) This statute does not affect estates acquired prior to its passage. (*Elliott v. Nichols*, 4 Bush, 502.)

<sup>4</sup> *Greenlaw v. Greenlaw*, 13 Me. 186; *Harding v. Springer*, 14 Me. 407.

<sup>5</sup> *Shaw v. Hearsey*, 5 Mass. 521; *Fox v. Fletcher*, 8 Mass. 274; *Varnum v. Abbot*, 12 Mass. 478.

<sup>6</sup> *Fisher v. Provin*, 25 Mich. 347.

<sup>7</sup> *Hemingway v. Scales*, 42 Miss. 1; 2 American Reports, 586.

<sup>8</sup> *Gibson v. Zimmerman*, 12 Mo. 386; *Garner v. Jones*, 52 Mo. 68.

<sup>9</sup> *Woodford v. Higly*, 1 Wins. 237; *Todd v. Zachary*, 1 Busbee Eq. 286.

<sup>10</sup> *Wright v. Sadler*, 20 N. Y. 320.

<sup>11</sup> *Den v. Hardenberg*, 5 Halst. 44; *Thomas v. De Baum*, 1 McCarter Ch. 40.

<sup>12</sup> *Robb v. Beaver*, 8 Watts & S. 127; *Auman v. Auman*, 21 Pa. St. 347; *Bates v. Seely*, 46 Pa. St. 249.

<sup>13</sup> *Taul v. Campbell*, 7 Yerg. 319; *Ames v. Norman*, 4 Sneed, 692.

<sup>14</sup> *Brownson v. Hull*, 16 Vt. 309.

<sup>15</sup> *Thornton v. Thornton*, 3 Rand, 179.

<sup>16</sup> *Ketchum v. Wallsworth*, 5 Wis. 95; *Bennett v. Child*, 19 Wis. 364.

persons other than executors, should be held as a tenancy in common, unless an intention sufficiently appeared from the conveyance that a joint-tenancy was intended. The Court of Queen's Bench had no doubt that this statute applied only to such conveyances as, but for the statute, would create a joint-tenancy; and that it therefore could not operate on a conveyance to a husband and wife.<sup>1</sup>

§ 66. **States where Tenancy by Entireties does not Exist.**—In Connecticut, estates by entireties have never been recognized. Deeds and devises to husband and wife are considered as vesting the estate conveyed or devised, in the same manner as to other persons. This rule in Connecticut is not based upon any statutory abolition of the common law, but upon the fact that, up to the time the question seems to have been first decided, (1836,) there had been a common understanding so long acquiesced in that the Court was unwilling to disturb it.<sup>2</sup> So in Ohio the decisions have always been averse to this estate. The main specification against it was that “The *jus accrescendi* is not founded in principles of natural justice, nor in any reasons of public policy applicable to our society or institutions. But, on the contrary, it is adverse to the understandings, habits, and feelings of the people.”<sup>3</sup> In Iowa, tenancy by entireties can be created only by express words for that purpose, the Courts of that State having decided that the statute declaring that conveyances to two or more in their own right create a tenancy in common, unless a contrary intent is expressed, is applicable to conveyances to husband and wife. In so deciding, the Court, after alluding to the tendency of legislation and of public sentiment against joint-tenancies, said: “But is it still true that the destruction, partial or *entire*, of joint-tenancies does not apply to or affect conveyances to husband and wife? In other words, is it true that in this State such conveyances are to *one person*, and that the survivor takes the whole? If the legal unity or oneness continues as fully as at common law, then there would seem

<sup>1</sup> In re Shaver, 31 Q. B. (Upper Canada) 605.

<sup>2</sup> Whittlesey v. Fuller, 11 Conn. 340.

<sup>3</sup> Sergeant v. Steinberger, 2 Ohio, 305; Wilson v. Fleming, 13 Ib. 68; Penn v. Cox, 16 Ib. 30

to be no escape from the conclusion. But this is just what is denied; and in the same connection it is also denied that the 'estate in entirety' exists in this State, or is known to our law.

"It is by no means asserted or claimed that husband and wife are two persons for all purposes, nor that the common-law idea of unity is by any means entirely abolished or *abrogated*. But what is asserted is, that as the wife may hold and convey real estate in the same manner as other persons, so she may take by the same tenure and subject to the same incidents, neither greater nor less, as though a *feme sole*. If no contrary intent is expressed in the conveyance to them, or the instrument under which they hold, the husband and wife take as tenants in common, and not in entirety. At common law, they were so far so completely, so essentially *one*, that they could not take by moieties. And why? Because of this absolute oneness. But does this reason longer exist, or, at least, with us?" After adverting to legislation in Iowa innovating upon the common law in regard to the powers of a married woman, the Court concluded that "her ability now, as compared with the rule of the common law, to take a separate estate, her ability to stand seized in her own right jointly with the husband, and to now hold by moieties, just as joint-tenants could—we say these considerations seem conclusively to show that the rule of the common law as to estates in entirety cannot obtain here. The doctrine always stood upon what was little more than the *merest fiction*, and as this, by our legislation, has measurably given way to theories and doctrines more in accord with the true and actual relations of husband and wife, the rule itself must be abandoned."<sup>1</sup>

§ 67. A tenancy by entireties may exist in an estate "in fee, in tail, for life, or for years, or other chattel real."<sup>2</sup> It may be of an estate in possession, reversion, or remainder.<sup>3</sup> It may also be of customary estates.<sup>4</sup> A tenancy by entireties of the legal estate may exist between husband and wife

<sup>1</sup> Hoffman v. Stigers, 28 Iowa, 307.

<sup>2</sup> 2 Preston on Abstracts of Title, 39; Wiscot's Case, 2 Rep. 60; 5 Bac. Ab. 244; Downing v. Seymour, Cro. Eliz. 912.

<sup>3</sup> Purefoy v. Rogers, 2 Saund 382.

<sup>4</sup> Glaister v. Hower, 8 Ves. 195.

under such circumstances that in equity they will be regarded as tenants in common. Thus, if a man and wife hold the equitable title to a tract of land as tenants in common, and a patent based upon such equitable title issue to them, they will thereafter hold the legal title as tenants by entireties, with the right of survivorship; yet her equitable estate will not be thereby defeated, but will descend to her heirs at her death.<sup>1</sup>

§ 68. **In Personal Property.**—Mr. Bishop, in his recent work on the Law of Married Women, says “if real estate is conveyed by deed to a husband and wife, this creates in them a peculiar kind of tenancy, known as tenancy by the entirety; the consequence of which is, that, during the coverture, neither can alien the land to the prejudice of the rights of the other, and on the dissolution of the coverture by the death of one of them, the survivor takes the whole. Nothing of this sort is known in respect of personal property. Since the wife cannot own personal property in her possession in her own right, but whatever title she has to such property vests in the husband, if a chattel is given or sold to husband and wife jointly, the title passes wholly to him.”<sup>2</sup> The declaration that nothing in the nature of tenancy by entirety is known in respect to personal property is supported by a single citation.<sup>3</sup> That it is so feebly supported is not attributable to omission to take advantage of whatever may have been available on that side of the question, but to the fact that there are certainly few cases, and in all probability no case, in accord with the one on which Mr. Bishop’s assertion is based. On the other hand, the reports, English and American, new and old, abound in cases recognizing tenancy by entirety in all kinds of personal estate, and enforcing the right of the surviving husband or wife to the entire property.”<sup>4</sup> Thus, a legacy to a husband and wife of £100 per annum vests

<sup>1</sup> *Norman v. Cunningham*, 5 Gratt. 70.

<sup>2</sup> *Bishop on the Law of Married Women*, sec. 211.

<sup>3</sup> *Polk v. Allen*, 19 Mo. 467. But in a later case in the same State, (*Shields v. Stillman*, 48 Mo. 86,) a husband and wife were regarded as tenants by entirety of a promissory note.

<sup>4</sup> *Bricker v. Whately*, 1 Vern. 233; *Cowper v. Scott*, 3 P. Wms. 121; *Atty. Genl. v. Bacchus*, 9 Price, 30.

in them as tenants by the entirety, and the survivor is entitled to the whole.<sup>1</sup> The same is true of a joint judgment in favor of husband and wife;<sup>2</sup> and of all choses in action taken by them in their joint names.<sup>3</sup> And whenever a husband procures stocks in the name of himself and wife, or takes notes, mortgages, or other securities in his and her names, a tenancy by entirety is created in such stocks, notes, mortgages, or other securities. The husband is presumed to have meant something by the use of his wife's name, and that something is also presumed to have been intended for her advantage. Had he desired to be sole owner, he would have used no name other than his own. But having had her name inserted with his own, she, in the event of his death, becomes sole owner of all which the two at the moment of his decease possessed as tenants by the entirety.<sup>4</sup> So, when a husband purchased a *Walk* in a *Chase*, and took the patent to himself and wife and B, and her right to the share of the patent was afterwards questioned, the Court said, "It shall be presumed to be intended as an advancement and provision for the wife;" and decreed that she should have the benefit of the patent during her life.<sup>5</sup>

§ 69. **Creation.**—"The same words of conveyance which would make two other persons joint-tenants will make a husband and wife tenants of the entirety, so that neither can sever the jointure, but the whole must accrue to the survivor."<sup>6</sup> Hence, a bequest to my daughter Catherine M., married to Samuel M., the one-eighth part *to them*, as it manifests by the use of the words "*to them*" an intent to give property to a husband and wife, gives rise to tenancy by entireties.<sup>7</sup> But it seems to be essential that the spouses be

<sup>1</sup> *Cowper v. Scott*, 3 P. Wms. 120.

<sup>2</sup> *Bond v. Simmons*, 3 Atk. 21; *Anon.* 3 Atk. 726; *Coppin v. —*, 2 P. Wms. 496.

<sup>3</sup> *Jickling's Analogy L. & Eq. Estates*, 257, citing *Temple v. Temple*, Cro. Eliz. 791; *Norton v. Glover*, Noy, 149. As to promissory note, see *Shields v. Stillman*, 48 Mo. 86.

<sup>4</sup> *In re Gadbury*, 32 Law J. Rep. (N. S.) Ch. 780; *Craig v. Craig*, 3 Barb. Ch. 104; *Draper v. Jackson*, 16 Mass. 486; *Christ's Hospital v. Rugdin*, 2 Vern. 688; *Rider v. Kidder*, 10 Ves. 360.

<sup>5</sup> *Kingdon v. Bridges*, 2 Vern. 67.

<sup>6</sup> *De Gray, C. J.*, in *Green v. King*, 2 Wm. Bl. 1218; *Martin v. Jackson*, 27 Pa. St. 504; *Doe v. Parratt*, 5 Term Rep. 652; *Farmer's Bank v. Gregory*, 49 Barb. 155; *Den v. Hardenbergh*, 5 Halst. 45.

<sup>7</sup> *Hamm v. Meisenhelter*, 9 Watts, 350.

*jointly entitled*, as well as jointly named, in the deed. Hence, if the wife alone be entitled to a conveyance, and it is made to her and her husband jointly, the latter will not be allowed to retain the whole by survivorship. This is equally true where the conveyance is so made at her request, because, being a married woman, she is presumed by the common law to have acted under the power and by the coercion of her husband.<sup>1</sup> Tenancy by entirety is not always created by purchase. In Pennsylvania, it has been determined that a husband and wife inheriting property as heirs of one of their children, acquire thereby an estate by entireties.<sup>2</sup>

§ 70. **Husband and Wife take as one Person.**—The husband and wife not only take an entire estate as *one person* when it is granted to them, but they are also regarded as *one person* in any conveyance made to them and others, and therefore take but one moiety. Thus, if a deed be made to A and wife and B, here A and wife together take but one half.<sup>3</sup> This is true whether the conveyance be intended to create a joint-tenancy or a tenancy in common.<sup>4</sup> A legacy was given to Captain R. G., his wife, and children. The Master of the Rolls, in construing the bequest, said: “The testatrix has used no words from which it can be discovered what, if any, intention she had with respect to the proportions in which the legatees were to take and enjoy the legacy thus given to them jointly. Under such circumstances, the proportion must be determined by the ordinary rule applicable to such cases; and there being nothing to distinguish the present case from those in which the rule stated in Littleton, and applied in several cases cited at the bar, was acted upon, I am of the opinion that the legatees must take in thirds: viz., the husband and wife one, and the two children each of them one.”<sup>5</sup>

<sup>1</sup> *Moore v. Moore*, 12 B. Monr. 664; *Babbitt v. Scroggin*, 1 Duval, 273.

<sup>2</sup> *Gillan v. Dixon*, 65 Pa. St. 895.

<sup>3</sup> *Doe v. Wilson*, 4 Barn. & Ala. 303; *Barber v. Harris*, 15 Wend. 615; *Back v. Andrew*, 2 Vern. 120; *Bricker v. Whatley*, 1 Vern. 238; Litt. sec. 291; *In re Wylde*, 2 D. M. & G. 724. Contra, see *Warrington v. Warrington*, 2 Hare, 56.

<sup>4</sup> *Johnson v. Hart*, 6 Watts & S. 319,

<sup>5</sup> *Gordon v. Whieldon*, 18 L. J. Rep. (N. S.) Chan. 5; 11 Beav. 170; *Atcheson v. Atcheson*, 18 L. J. Rep. (N. S.) Chanc. 230; 11 Beav. 485.

§ 71. **That Husband and Wife cannot take by Moieties.**—We have seen that the peculiar ground on which the tenancy by entireties rests is the legal identity of husband and wife. “Husband and wife being one person in law, they cannot, during the coverture, take separate estates; and therefore, upon a purchase by both, they cannot be seized by moieties, but both and each has the entirety.”<sup>1</sup> The language just quoted was used in support of the proposition that husband and wife take by entireties in all cases when there is no express limitation. But, going beyond the necessities of the case out of which it arose, it assumes, beyond mistake, that the inevitable consequence of the legal identity of husband and wife is, that they can receive, during coverture, no estate which does not vest in them by entireties. No doubt, there are a number of cases, both English and American, containing dicta which, like that quoted above, seem inconsistent with the possibility of husband and wife receiving an estate by moieties.<sup>2</sup> But in addition to the dicta alluded to, there are cases directly in point affirming that the spouses cannot take estates as tenants in common, nor as joint-tenants. Thus, in New York, a deed was made to J. C. and his wife “as tenants in common, and in equality of estate, and not as joint-tenants.” The Assistant Vice-Chancellor, after some discussion of the authorities, determined that this conveyance necessarily passed an estate by entireties, because there was “a legal incapacity to take in severalty, arising from a legal identity; and a grantor cannot remove that incapacity without the intervention of a trustee.”<sup>3</sup> In Pennsylvania, a deed to Wm. B. and his wife Rebecca, purported to convey to them “as tenants in common, and not as joint-tenants.” After citing and approving the decision made by the Assistant Vice-Chancellor in New York, the Supreme Court of Pennsylvania, in an opinion in reference to the legal effect of this last deed, said: “If the doctrine to which we refer is not a mere rule for ascertaining the meaning of words, but a rule of law founded on the rights and incapacities of the matrimonial union, it

<sup>1</sup> Green v. King, 2 W. Bl. 121.

<sup>2</sup> Rogers v. Benson, 5 John. Ch. 437; Jackson v. Stevens, 16 Johns. 115; Barber v. Harris, 15 Wend. 617.

<sup>3</sup> Dias v. Glover, 1 Hoffm. Ch. 76.



must be obvious that the *intention* of the parties to the conveyance is entirely immaterial. If the husband and wife *cannot take* a conveyance by moieties, if they are absolutely *incapable of receiving such a grant*, it is clear that no words in the conveyance to them, however clearly expressed, can give them that capacity. How stands the argument on this question? Tenants in common may sell their respective shares. They are compellable to make *partition*. They are liable to reciprocal actions of *waste* and *account*; and if one turns the other out of possession, an action of *ejectment* will lie against him. These incidents cannot exist in an estate held by husband and wife. No action of *partition* or *waste*, or *account* or *ejectment*, can be maintained by one against the other. The husband could not sell his moiety free from the dower of his wife. The wife could not sell hers at all without the consent of her husband. It is evident, therefore, that the estate, during the lives of the grantees, or during the continuance of the marriage bond, would have none of the chief incidents of a tenancy in common. The existence of a tenancy in common, which cannot be so held or enjoyed during the lives of the holders, and which has none of the incidents of such an estate, is a legal impossibility. If they cannot hold in common during their lives, of course they cannot so hold after one of the parties is dead.”<sup>1</sup> So, in Ireland, when a conveyance was made to husband and wife, the Court was “of opinion that the operation of that conveyance was to grant an estate by entireties; for to speak of a grant to a husband and wife as an estate of joint-tenancy is, properly speaking, a solecism.”<sup>2</sup>

§ 72. **That Husband and Wife may take by Moieties.**—The decisions, as we have seen in the preceding section, denying that husband and wife may take an estate other than by entireties, rest upon two grounds. The first and chief of these grounds is that the spouses cannot *take* any other estate; the second, as appears from the reasoning quoted from the opinion of the Supreme Court of Pennsylvania, is that the spouses cannot, during coverture, *enjoy* any other estate.

<sup>1</sup> *Stuckey v. Keefe's Ex.* 26 Pa. St. 400.

<sup>2</sup> *Pollok v. Kelly*, 6 Ir. L. R. (N. S.) 373.



The second ground can, we think, be readily disposed of, by the authorities. For though the rights and remedies of a married woman, who is cotenant with her husband, may be limited during coverture, she is nevertheless as much a cotenant with him as she was before their marriage. There can be no doubt that if a man and woman, holding an estate as cotenants, marry, they will continue to be joint-tenants, or tenants in common, as before their marriage.<sup>1</sup> So there is no reason for asserting that husband and wife cannot *hold* but by entireties. But the second ground cannot be so easily answered. Husband and wife may take an estate as tenants in common, or as joint-tenants, as between themselves and others. Thus, if a bequest were made to A and wife and B, with words of severance, it would vest as a tenancy in common—A and wife having one moiety, and B the other;<sup>2</sup> but the moiety of A and wife would nevertheless vest in them as an entirety.<sup>3</sup> But it is doubtful whether any reported case, prior to the publication of Mr. Preston's "Treatise on Estates," ever supported the doctrine that, as between themselves, husband and wife can take an estate other than by entireties. In that treatise, the assertion was made, that "in point of fact, and agreeable to natural reason, free from artificial deductions, the husband and wife are distinct and individual persons; and accordingly, when lands are granted to them as tenants in common, thereby treating them without any respect to their social union, they will hold by moieties, as other distinct and individual persons would do."<sup>4</sup> Clear as this language is, and logical as it seems to be, it has the peculiarity of being the cause rather than the result of the reported decisions in harmony with it. It finds no support in the early reports or text-books; and Mr. Preston was so fully aware of the doubtful character of his assertion that, in his work on Abstracts of Title,<sup>5</sup> he repeated it in this modified

<sup>1</sup> *Moody v. Moody*, Amb. 649; *McDermott v. French*, 15 N. J. Eq. 80; *Dew v. Hardenbergh*, 5 Halst. 46; Co. Litt. 187 b. So a wife may become tenant in common with her husband, by a conveyance to her from her husband's cotenant. (*Moore v. Moore*, 47 N. Y. 467.)

<sup>2</sup> *Paine v. Wagner*, 12 Sim. 188.

<sup>3</sup> *Barber v. Harris*, 15 Wend. 617.

<sup>4</sup> 1 Prest. on Estates, 132.

<sup>5</sup> Vol. 2, p. 41.

form: "And even a husband and wife may, by express words, *at least so the law is understood*, be made tenants in common by a gift to them during coverture." In America, the doctrine of Mr. Preston has met with some approval. In New York, the decisions are variant. That of the Assistant Vice-Chancellor, made in 1839, has already been alluded to in the preceding section. Subsequently, a case came before the Vice-Chancellor, where a deed had been made to husband and wife, "the one equal half part to each." The decision made upon this deed was based upon a citation from one of Mr. Preston's works. The Vice-Chancellor stated the substance of the rule as laid down by Mr. Preston, and added: "I have no hesitation about adopting and following this rule, especially in a court of equity where the intention of the parties in any deed or instrument, not contrary to law, should be allowed to prevail."<sup>1</sup> In New Jersey, a bill for partition alleged that on the 1st of September, 1858, a husband and wife were seized in fee of the premises, as tenants in common, by virtue of a certain conveyance made to them; that thereafter the husband had sold his interest to the complainant. The bill was against the wife to compel partition. A demurrer was interposed, on the ground that the estate conveyed to the husband and wife must necessarily have been an entirety, and was therefore not subject to partition. This portion of the demurrer was overruled, on the authority of Mr. Preston, reference being made to his work on Estates. The Chancellor said: "So it seems that a husband and wife may, by express words, be made tenants in common by gift to them during coverture. The bill alleges that the husband and wife were seized as tenants in common by virtue of a conveyance made to them. Even, therefore, if it appears by the bill that the conveyance was made during coverture, that fact is not absolutely inconsistent with the creation of a tenancy in common. As there is a direct averment that the conveyance created a tenancy in common, it must be assumed that apt words were used in the deed for that purpose. This objection cannot prevail upon demurrer."<sup>2</sup>

<sup>1</sup> Hicks v. Cochran, 4 Edw. Ch. 110.

<sup>2</sup> McDermott v. French, 15 N. J. Eq. 80.

§ 73. **Power of Husband over Estate by Entireties.**—The title and rights of the wife in an estate held by herself and husband by entireties, are not liable to be conveyed, encumbered, or otherwise prejudiced or disposed of, by her husband to any greater extent than though such estate was vested in her exclusively in her own right. Many cases contain the general statement that no conveyance or encumbrance made by the husband is valid against the wife.<sup>1</sup> Upon examination of these cases, it will be found that the general language employed in them is applicable only to the rights of the wife as the survivor of such species of property as would not have been subject to the control and disposal of the husband had she owned it in severalty. As to such property, not even the conviction of a husband for high treason can defeat the right of his wife to the whole as survivor.<sup>2</sup> It must be remembered that a husband by marriage acquires, “during coverture, the usufruct of all the real estate which his wife has, in fee-simple, fee-tail, or for life;” that he has the further right to reduce her personal estate to his possession, to sue for her chattels and upon her choses in action in his own name, and to dispose of her personal property as he may think fit. The same power which enables a husband to obtain possession and control of the wife’s estate when held by her in severalty, entitles him to a similar power over her interest in like property held by herself and husband in entireties. There is therefore little or no doubt that, by the common law, the husband could dispose of the possession of real estate held by entireties, and that he could mortgage and otherwise encumber such real estate, and that his grantee or mortgagee thereby acquired rights which were paramount to the rights of the wife during the life of the husband, and subordinate only to her claim as survivor. So in regard to personal estate held by entireties, the husband could reduce it to his sole possession, and claim and hold it as his sole property. When he so reduced it, it became his, and he could sell or encumber it at his pleasure.<sup>3</sup>

<sup>1</sup> Doe v. Parratt, 5 T. R. 655; Bennett v. Child, 19 Wis. 365; Bomar v. Mullins, 4 Rich. Eq. 80; Ketchum v. Walsworth, 5 Wis. 95.

<sup>2</sup> Washburn v. Burns, 34 N. J. Law, 19; Co. Litt. 147 a; Beaumont’s Case, 9 Rep. 140 b.

<sup>3</sup> Draper v. Jackson, 16 Mass. 486; Grute v. Locroft, Cro. Eliz. 287; Watts v. Thomas,

§ 74. **Sale under Execution.**—In a recent work on Judicial Sales, the statement is made that “no separate proceeding against one of them during their joint lives will, by sale, affect the title to the property as against the other one as survivor, or as against the two during their joint lives.”<sup>1</sup> The rule as thus laid down, ignores the interest which the husband, by his marital rights, has in the property of his wife. As the husband could, by the common law, dispose of all chattels and chattel interests of the wife, and of the possession of her real estate during their joint lives, he had such an interest in her estate as might be subjected to involuntary alienation by sale under execution. Hence, there seems but little doubt that where the marital rights of the husband in the wife’s property remain as at common law, they are subject to seizure and forced sale under execution; and that the purchaser at such sale will acquire an interest in the estate sold, by virtue of which he will succeed to all the rights and privileges which the husband had, by law, in the property sold.<sup>2</sup> It is true that a few American cases are inconsistent with this rule. Most of them seem to have been decided, so far as this point is concerned, without any consideration of the authorities, and without any necessity of determining this question.<sup>3</sup> But in Indiana, this point was recently considered at great length, and most of the authorities bearing on the subject were commented upon by the Court. The result was a denial of the husband’s marital powers over an estate held in entireties, including a denial of his right to dispose of the possession of real estate, or in any way to transfer to a third person, by voluntary or involuntary alienation, any interest which could be asserted against the wife, even during her husband’s lifetime. The Court said: “As between husband and wife, there is but one owner, and that is neither the one

2 P. Wms. 364; *Bates v. Dandy*, 2 Atk. 207; *McCurdy v. Canning*, 64 Pa. St. 40; *Bennett v. Child*, 19 Wis. 365; *Torrey v. Torrey*, 14 N. Y. 430; *Jackson v. McConnell*, 19 Wend. 175; *Barber v. Harris*, 15 Wend. 617; *Ames v. Norman*, 4 Sneed, 692; *Farmer v. Gregory*, 49 Barb. 155.

<sup>1</sup> Rorer on Judicial Sales, sec. 549.

<sup>2</sup> *Ames v. Norman*, 4 Sneed, 692; *Stoebler v. Knerr*, 5 Watts, 181; *French v. Mehan*, 56 Pa. St. 289; *McCurdy v. Canning*, 64 Pa. St. 41; *Bennett v. Child*, 19 Wis. 362; *Litchfield v. Cudworth*, 15 Pick. 23; *Brown v. Gale*, 5 N. H. 416.

<sup>3</sup> *Jackson v. McConnell*, 19 Wend. 178; *Thomas v. De Baum*, 1 McCarter Ch. 40.

nor the other, but both together. The estate belongs as well to the wife as to the husband. Then, how can the husband possess any interest separate from his wife, or how can he alienate or encumber the estate, when all the authorities agree that the wife can neither convey nor encumber such estate? We are of the opinion that, from the peculiar nature of this estate, and from the legal relations of the parties, there must be unity of estate, unity of possession, unity of control, and unity in conveying or encumbering it; and it necessarily and logically results that it cannot be sold upon execution for the separate debts of either the husband or of the wife. The estate is placed beyond the exclusive control of either of the parties, or the reach of creditors, unless it can be successfully attached and set aside for fraud."<sup>1</sup>

§ 75. **Husband's Powers affected by Statutes.**—In many of the States, the common law in regard to the marital rights of a husband in the property of his wife, has been materially modified by statute. These statutes influence the law in regard to estates held in entireties as well as in regard to those held by the wife in severalty. Thus, in Pennsylvania, the act of April 11, 1848, declared that "every species of property of whatever name or kind, which may accrue to any married woman during coverture, shall be owned, used, and enjoyed by such married woman as her own separate property, and shall not be subject to levy and execution for the debts of her husband, nor shall such property be sold, conveyed, mortgaged, or transferred, or in any manner encumbered, by her husband, without her written consent first had and obtained." Under this act, it has been determined that a purchaser of the husband's interest in property held in entireties, either at a voluntary or an involuntary sale, can never assert it against the wife, because if the claims of such purchaser were recognized, the rights of the wife would be disregarded: 1st, by destroying her estate by entireties, and creating out of it a tenancy in common; 2d, by depriving her of her possession with her husband, and obliging her to hold possession with a stranger; 3d, by taking away her property without her

<sup>1</sup> *Chandler v. Cheney*, 37 Ind. 408.

assent.<sup>1</sup> The principle thus asserted in Pennsylvania, has, under a very similar statute, been affirmed by a number of decisions in Indiana.<sup>2</sup>

§ 76. **Dissolution of the Tenancy by Death or Divorce.**—In the event of the death of either spouse during the continuance of an estate held by entireties, the survivor continues seized of the whole. During the continuance of the marital relations, neither husband nor wife can change the character of the tenancy so as to become a tenant in common, nor a joint-tenant, nor an owner in severalty. But by a decree of divorce, the legal unity of person, on which the estate depended, is destroyed; “one legal person has been resolved by judgment of law into two distinct, individual persons, having in future no relations to each other; and with this change in their relations, must necessarily follow a corresponding change of the tenancy dependent upon the previous relation. As they cannot longer hold in joint seisin, they must hold by moieties.”<sup>3</sup> But it is claimed that if a husband alienate property held by entireties, the alienee takes a title not dependent on a continuance of the marital relations; and that the wife is not, by virtue of the annulment of the marriage, entitled to the possession of her moiety from her husband’s grantee. The purchase, “not made in view of the contingency of the wife’s divorce, cannot be affected by it.”<sup>4</sup> But in the event of the death of a husband, the rights of the alienee of property of which the husband could make no absolute disposition, cease; and the surviving wife may recover possession by an action of ejectment.<sup>5</sup>

<sup>1</sup> *McCurdy v. Canning*, 64 Pa. St. 41.

<sup>2</sup> *Davis v. Clark*, 26 Ind. 424; *Arnold v. Arnold*, 30 Ind. 305; *Simpson v. Pearson*, 31 Ind. 1; *Chandler v. Cheney*, 37 Ind. 413.

<sup>3</sup> *Ames v. Norman*, 4 Sneed, 696; 2 *Bright on Husband and Wife*, 365.

<sup>4</sup> *Ames v. Norman*, 4 Sneed, 696.

<sup>5</sup> *Brownson v. Hull*, 16 Vt. 309.

## CHAPTER V.

### OF PARCENERS.

Definitions, § 77.

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Parceners by the Common Law, § 79.

Of what Estates, § 80.

General Properties, § 81.

All make but one Heir, § 82.

Continuance of, § 83.

Destruction, § 84.

Generally Abolished in United States and in Canada, § 85.

§ 77. **Definitions.**—"Parcenary is a title by DESCENT, and arises on the death of a person seized of an estate of inheritance, leaving two or more females lieneal or collateral, his next heir."<sup>1</sup> "Coparceners are several persons taking lands, or any undivided share of lands, held for an estate of inheritance by descent."<sup>2</sup> This estate arises "where lands of inheritance descend from the ancestor to two or more persons, as his daughters, sisters, aunts, cousins, or their representatives, or the males in gavelkind."<sup>3</sup> "This tenancie in the ancient books of law is called *adæquatio*, and sometime *familia herciscunda*, an inheritance to be divided; and many times parceners are called coparceners."<sup>4</sup> The definition first quoted indicates that parceners are always females. In this it is erroneous, for parceners may be males as well as females. Males are in some instances made parceners by direct descent from their common ancestor, and in other instances they become parceners by being heirs to a female parcener.<sup>5</sup>

<sup>1</sup> Jickling on Anal. L. & Equitable Estates, 222.

<sup>2</sup> Preston on Abstracts of Title, 68. See also 2 Bl. Comm. 187.

<sup>3</sup> 4 Dane's Ab. 758.

<sup>4</sup> Co. Litt. 164 b.

<sup>5</sup> The most concise and perfect definition of coparcenary which we have seen is that in Burrill's Law Dictionary, (title Estates,) namely: "An estate acquired by two or more persons (usually females) by descent from the same ancestor."

§ 78. "Parceners are of two sorts, to wit: parceners according to the course of the common law, and parceners according to custome. Parceners after the course of the common law, are, where a man, or woman, seized of certain lands or tenements in fee-simple or in taile, hath no issue but daughters and dieth, and the tenements descend to the issue, and the daughters enter into the lands or tenements so descended to them, then they are called parceners, because by the writ which is called *breve de participatione facienda*, the law will constrain them that partition shall be made among them."<sup>1</sup> Parceners according to the course of the common law, include aunts, cousins, and sisters, to whom lands descend from the same person. But if there be but one daughter, she is not called a parcener, but "daughter and heire."<sup>2</sup> "Parceners by custome are, where a man seized in fee-simple, or in fee-taile, of lands or tenements which are of the tenure called gavelkind within the countie of Kent, and hath issue divers sons and die, such lands or tenements shall descend to all the sons by custome, and they shall equally inherit and make partition by the custome as females shall do."<sup>3</sup> There seems to be no difference between the rights of parceners by custom and parceners by the course of the common law.<sup>4</sup>

§ 79. Parceners by the common law must be either females or the heirs of females.<sup>5</sup> All the daughters of a man are equally his heirs, whether born of the same or of different mothers. They are therefore all equally parceners.<sup>6</sup> Coparceners can acquire their estate by descent only. If two sisters acquire lands by purchase, they are not parceners, but joint-tenants, or tenants in common.<sup>7</sup> If a coparcener die leaving a male heir, he will succeed to her estate, and will hold the same as a coparcener. By this means, men become parceners even by the course of the common law. A man may be parcener with himself. This happens when one-half of an estate descends to him from his father, and one-half from his mother. If he die in such case, without lineal de-

<sup>1</sup> Litt. sec. 241; Chitty on Descents, 76.

<sup>2</sup> Litt. sec. 242.

<sup>3</sup> Litt. sec. 265; Chitty on Descents, 182.

<sup>4</sup> Leigh v. Shepherd, 2 Bro. & B. 465.

<sup>5</sup> Chitty on Descents, 76.

<sup>6</sup> Chitty on Descents, 78.

<sup>7</sup> Chitty on Descents, 76; Litt. sec. 254.



scendants, the half which came to him from his father descends to his father's heirs, while the other half descends to the heirs of his mother.<sup>1</sup>

§ 80. **What Estates confined to.**—As coparceners acquire by descent, they cannot hold any other than an estate of inheritance.<sup>2</sup> An estate in parcenary may be of “land,<sup>3</sup> rents,<sup>4</sup> advowsons,<sup>5</sup> reversions,<sup>6</sup> indeed in nearly all property, corporeal or incorporeal, which is in its nature descendible.”<sup>7</sup> As to advowsons, the eldest of the coparceners seems to be entitled the privilege of making the first presentation. This privilege descends to her issue, or it may pass to her assignee, or to her husband as tenant by the curtesy.<sup>8</sup> And in general when the property is not susceptible of partition, as, for instance, “the mansion house, common of estovers, common of piscary uncertain, or any other common without” stint, shall not be divided, but the eldest sister or other eldest parcener shall take it and make satisfaction therefor to the coparceners out of other parts of the inheritance; but if this satisfaction cannot be made, then the parceners may enjoy such indivisible property by turns.<sup>9</sup>

§ 81. **The general properties of an estate held in coparcenary** are, in most respects, very like the properties of a joint-tenancy. The former has three unities, viz., unity of title, unity of interest, and unity of possession; while the latter has the same three unities, and usually, but not necessarily, a fourth, unity of time. The latter estate is invariably acquired by purchase, and the former by descent. Coparceners have a unity but not an entirety of interest; and, between themselves, are, for many purposes, regarded as having several freeholds. Joint-tenants have equal interests: the

<sup>1</sup> 1 Washb. on Real Estate, 561.

<sup>2</sup> Chitty on Descents, 76, 77.

<sup>3</sup> Co. Litt. 163 b.

<sup>4</sup> Co. Litt. 164 b.

<sup>5</sup> Harris v. Nichols, Cro. Eliz. 19; Buller v. Bishop of Exeter, 1 Ves. 340.

<sup>6</sup> Anon, 3 Leon, 6; Stedman v. Bates, Saek 390.

<sup>7</sup> Jickling Anal. L. & Eq. Estates, 229.

<sup>8</sup> Chitty on Descents, 196-7; Johnstone v. Baber, 39 E. L. & Eq. 189; S. C. 25 L. J. Rep. Ch. 899; DeGex, M. & G. 489; 22 Beav. 562; 2 Bl. Comm. 189.

<sup>9</sup> 2 Bl. Comm. 190; 2 Cruise Dig. 397.

interests of parceners may be equal or unequal. The number of the parceners may be augmented by the decease of one of them, leaving several heirs; but the number of joint-tenants necessarily diminishes with each succeeding death, until the whole estate ultimately vests in the last survivor. But the most important distinction between these two tenancies arises from the fact that between coparceners "there is no *jus accrescendi*, or survivorship, for each part descends severally to their respective heirs, though the unity of possession continues."<sup>1</sup>

§ 82. "Coparceners make but one heir, wherefore it follows that although, where there are two parceners, they have moieties in the lands descended to them, yet are they both but one heir; and one of them is not the moiety of an heir, but both of them are but *unus hæres*."<sup>2</sup>

§ 83. **Continuance of Coparcenary.**—As long as an estate is held by two or more persons by descent, they are parceners. Thus, if one of two daughters, to whom an estate passed by descent from their ancestor, die, her heir becomes parcener with the survivor. If both of the daughters die, their heirs become parceners. "And as long as the lands continue in a course of descent, and united in possession, so long are the tenants therein, whether male or female, called parceners."<sup>3</sup> Hence, in the case of coparceners, the descent may be either *in stirpes*, or *in capita*. Thus if a man die, leaving as his heirs two daughters, the descent to them is *in capita*. But if, prior to the death of the father, the daughters had died, the elder of them leaving three daughters, and the younger leaving one daughter, the descent must be *in stirpes*, and the daughter of the younger must receive the same share as the three daughters of the elder.<sup>4</sup>

§ 84. **Destruction.**—Though an estate in coparcenary cannot be destroyed, as long as it remains in two or more persons

<sup>1</sup> 2 Cruise by Greenl. 391, 392; 4 Dane Ab. 758; 2 Bl. Comm. 188; Chitty on Descents, 77.

<sup>2</sup> Chitty on Descents, 75; 2 Cruise, 391; Co. Litt. 163 b; Hoffer v. Dement, 5 Gill, 137.

<sup>3</sup> Chitty on Descents, 78; 4 Dane Ab. 758.

<sup>4</sup> Chitty on Descents, 77, 85.

by descent, it may be terminated by partition, by alienation, or by a union of the interests of all the coparceners in one parcener as heir of the others. An alienation by any of the parceners, disunites her title and interest from that of the others, and the coparcenary is thereby destroyed if there were but two parceners, but if there were more than two, those who did not convey remain coparceners as between one another, but are tenants in common with the alienee of the part so conveyed.<sup>1</sup>

§ 85. **Generally Abolished.**—As persons to whom estates jointly descend are, in the United States, generally treated as tenants in common, “the distinction of estates in coparcenary is of comparatively little practical importance, and properly gives place to the familiar form of joint estates in universal use, tenancy in common.”<sup>2</sup> The same remark is equally applicable to the province of Upper Canada, coparcenary having there been changed into tenancy in common, by sec. 38 Ch. 82 of Cons. Statutes.<sup>3</sup>

<sup>1</sup> Chitty on Descents, 78; 2 Bl. Comm. 191; 2 Cruise, 394.

<sup>2</sup> 1 Washb. on Real Est. 415; Sec. 1909 Code of Ala.; Laws of B. I. ed. of 1872, 348; Miller's Appeal, 3 Grant, 247; Stevenson v. Cofferin, 20 N. H. 150.

<sup>3</sup> Leith's Real Property Statutes, 55, 195.

## CHAPTER VI.

### TENANCY IN COMMON.

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§ 86. **Definitions.**—"Tenants in common are they which have lands or tenements in fee-simple, fee-taile, or for terme of life, &c., and they have such lands or tenements by severall titles, and not by a joynt title, and none of them know of this his severall, but they ought by law to occupie these lands or tenements in common."<sup>1</sup> The several tenancies are best distinguished from one another by considering the unities of each. Beginning with tenancy by entireties, we find five unities, viz., a unity of possession, of title, of estate, of time, and of person. Next comes joint-tenancy with the same unities as tenancy by entirety, except that of person. Then, next below joint-tenancy, is coparcenary, with its three unities, viz., of title, of possession, and of estate. And lastly, we have tenancy in common, which is different from the other tenancies in this, that it requires but one unity—that of possession. It is therefore a sufficient description of tenants in common to say that they "are persons who hold by unity of possession."<sup>2</sup> "It is not necessary that there should be either unity of tenure in the different portions of the land, or unity of estate in the several owners thereof, to constitute a tenancy in common. Unity of right of possession merely is all that is required."<sup>3</sup> But tenants in common may also have a unity of interest, title, and time.<sup>4</sup>

§ 87. **Equal Right to Possession essential to.**—To constitute a tenancy in common, there must be an equal right to the possession of every part and parcel of the subject-matter of the tenancy. Several persons may together own an entire thing without being cotenants. This is always the case where one of them has the exclusive right of possession in one part of the thing, and the others have such exclusive right in the other parts. Thus, A may own the basement of a house, and B the first story above; or C and D may own contiguous rooms on the same floor; and E may have the right to enter and reënter for specified purposes. Here, though no one person fully owns the entire house, yet each as to his part has an estate in severalty. As between each

<sup>1</sup> Litt. sec. 292; 2 Cruise Dig. 399.      <sup>2</sup> 4 Kent Comm. 367.

<sup>3</sup> Putnam v. Ritchie, 6 Paige Ch. 398.      <sup>4</sup> Smith on Real and Pers. Prop. 246 (4th ed.)

other, they have neither the rights, remedies, nor relations of tenants in common. Each has a separate dwelling in law.<sup>1</sup>

§ 88. **What may be held by.**—A tenancy in common may exist in every species of property, real, personal, or mixed. Two or more persons may, therefore, be tenants in common of a fixture,<sup>2</sup> or of the right to use or convey water in a ditch. “It is true that the mere right to water is a sort of incorporeal thing; but the water itself is substantial and tangible, and as the right gives the party control and possession of this commodity, and entitles the party to damages for its diversion by another, we do not see why this right may not be acquired by two or more acting together, or why, when they do acquire it, they do not hold it as other property.”<sup>3</sup> And if a number of persons adopt a trade-mark for their united interest, or had inherited such mark, it is said that they are tenants in common thereof.<sup>4</sup> So, too, a franchise may be held by two or more persons as tenants in common.<sup>5</sup>

§ 89. **Co-Patentees.**—No doubt, the rights and privileges created by virtue of the issuing of letters patent for an invention may be held by two or more persons. But whether, when so held, the parties are tenants in common, is a question not fully determined in this country. The parties may, beyond all question, enter into such an agreement in regard to their patent as will make them tenants in common. But, in the absence of any stipulation, what are the relations of co-patentees by mere operation of their patent? In one instance, the answer given is that they “are simply joint-owners, or tenants in common, of the rights and property secured by the patent; and their rights, powers, and duties as respects each other, must be substantially those of the joint-owners of a chattel.”<sup>6</sup> In the first opinion by an American Judge, in

<sup>1</sup> *Wiggin v. Wiggin*, 43 N. H. 561; *Abbott v. Wood*, 18 Me. 115; *McCormack v. Bishop*, 28 Iowa, 233; *Loring v. Bacon*, 4 Mass. 575; *Cheeseborough v. Green*, 10 Conn. 320.

<sup>2</sup> *Hill v. Hill*, 43 Penn. St. 521.

<sup>3</sup> *Kimball v. Gearhart*, 12 Cal. 47; *Bradley v. Harkness*, 26 Cal. 69; *Reed v. Spicer*, 27 Cal. 57.

<sup>4</sup> *Browne on Trade Marks*, sec. 604.

<sup>5</sup> *Harven v. Mehlgarten*, 19 Ill. 95; *Livingston v. Lynch*, 4 Johns. Oh. 573.

<sup>6</sup> *Pitts v. Hall*, 3 Blatchf. C. C. 206.

which this subject seems to have been much considered, the conclusions were announced as being subject to further discussion of the question, and as being put forth "in the hope that the attention of the parties interested may be attracted to the subject, and that the question may be brought before the Supreme Court of the United States for adjudication." The conclusions, so announced, were that joint-patentees were substantially tenants in common, and having between each other the rights and remedies accorded by law to such tenants; and that if either "appropriates any portion of the exclusive right or common property to his separate use or benefit, by either the use or sale of the patented machine, he does what is in principle the same as a conversion, by destruction or sale, of the joint property by a tenant in common, which authorizes his cotenant to maintain trover."<sup>1</sup> The Court, therefore, considered that no objection existed to the maintaining, by one joint-owner of a patent, of an action against his co-owner for infringement. But other American authorities at least doubt the correctness of the conclusion that one joint-patentee is responsible to his co-owner for an infringement of their patent.<sup>2</sup> In Massachusetts, an action was brought to compel the defendants to account with plaintiffs, and to pay over to them such sums as might be found due. The facts on which the plaintiff relied were as follows: The owners of an invention, and letters patent issued therefor, transferred to three other persons the exclusive right, within specified parts of the county of Middlesex, to use and to vend to others to use (but not to build or make) the machines constructed according to the patent. The right so transferred subsequently became vested in two persons. These two both sold machines within the allotted territory. It appeared that one of them had sold seventeen more machines than the other, and realized large profits therefrom. The question before the Court was whether he should be required to account for the profits made from the sale of these machines. After considering the analogies between patent rights and other species of property, the Court determined that they

<sup>1</sup> *Pitts v. Hall*, 3 Blatchf. C. C. 208.

<sup>2</sup> *Curtis on Patents*, sec. 188-190; *Clum v. Brewer*, 2 Curtis C. C. 524.

were "compelled to reject all arguments from analogy, and look at the question upon its own apparent merits." Looking at the question in this light, they said: "There is nothing to restrict the party owning each moiety of the right from selling and assigning that moiety, or any fractional part of it, or as many fractional parts as he pleases. Each may purchase as many machines as he pleases; and having purchased them, he may sell them to others, with the right to use and sell them; or may refuse to sell them, and may rent them, or establish manufactories, either alone or in company with others, in which the machines shall be used. Or either party may neglect or refuse to purchase, use or sell, any machines or any rights, or to make his moiety profitable in any way. The right is thus subject to transfers and subdivisions, and may be used in a great variety of ways. None of the parties interested has any right to control the action of the other parties, or to exercise any supervision over them. It is difficult to see how an equitable right to contribution can exist among any of them, unless it includes all the parties interested, and extends through the whole term of the patent right. And if there be a claim for contribution of profits, there should also be a correlative claim for losses, and an obligation upon each party to use diligence in making his interest profitable. \* \* \* In the absence of any contract, we think each party was at liberty to use his moiety as he might think fit, within the territory described. If the defendants have realized any profits in the manner alleged, it has been by investing capital in the purchase of machines, and the use of skill and labor in selling them; and they have taken the risk of losses. Apparently there is no more reason why the plaintiffs should claim a part of the advanced price for which they may have sold their machines, than there would have been for claiming a part of the price if they had sold the right itself for an advance. It may possibly be that the sale of seventeen machines so far supplies the market that the plaintiffs' moiety of the right is greatly reduced in value; but if it be so, the consequence is very remote, and dependent upon a great variety of causes. There have been patented articles in respect to which such a sale would have greatly enhanced the value of the other moiety of the right, by its



tendency to create a demand. Such a consequence would also be remote. These parties must be regarded as having interests which are distinct and separate in their nature, though they are derived from the same contract; and having such interests, with the right to use them separately, they cannot, for any legal use of them, incur any obligation to each other.”<sup>1</sup>

In England, co-patentees seem to be rather owners in severalty than cotenants. Each may use the patent without subjecting himself to liability to the other. “The right conferred is a right to exclude all the world other than the grantees from using the invention. But there is no exclusion in the letters patent of any one of the patentees. The inability of any one of the patentees to use the invention, if any such liability exists, must be sought elsewhere than in the letters patent. But there is no principle, in the absence of contract, which can prevent any persons not prohibited by statute from using any invention whatever. Is there any implied contract where two or more persons jointly obtain letters patent that no one of them shall use the invention without the consent of the others, or if he does, that he shall use it for their joint benefit? I can discover no principle for such a doctrine. It would enable one of two patentees either to prevent the use of the invention altogether, or else to compel the other patentee to use his skill and capital in the use of an invention on the terms of being accountable for half the profit, if profit should be made, without being able to call on his co-patentee for contribution if there should be loss. This would be to place the parties in a relation to each other which I think no Court can assume to have been intended in the absence of express contract to that effect.”<sup>2</sup>

§ 90. **Who may be.**—All persons, natural and artificial, capable of acquiring property, real or personal, may become tenants in common with one another. In a preceding chapter, it has been shown that corporations, whether sole or aggregate, cannot be joint-tenants with one another nor with a natural

<sup>1</sup> *Vose v. Singer*, 4 Allen, 228.

<sup>2</sup> Lord Chancellor Cranworth, in *Mathews v. Green*, Law R. 1 Ch. 33. See also *Re Russell's Patent*, 2 De G. & J. 130.

person, because the incident of survivorship—one of the chief and most important attached to joint-tenancies—could not be applied to either of two artificial persons endowed with perpetual life, and ought not to attach where, from one tenant being natural and perishable, and the other artificial and perpetual, there could be “no reciprocity of survivorship between them.” The reasons preventing corporations from holding an estate as joint-tenants, do not exist in regard to tenancies in common. Therefore, “the books and cases do not afford any instance in which this right of holding lands as tenants in common, either with each other or with natural persons, is denied to corporations.”<sup>1</sup>

§ 91. **Legislative Grantees.**—It is said that a grant by the Legislature is not always subject to the same rules that govern grants to private persons, and that it is a statute conveyance, to be interpreted and controlled by the intent of the Legislature in making it. Hence, where land was frequently granted in large tracts to a number of persons, on condition of settlement, it was held that the grantees took as tenants in common, because the Court were sure that such, beyond reasonable doubt, was the intent of the Legislature.<sup>2</sup>

§ 92. **A tenancy in common may be created by any of the various means by which two or more persons can acquire a unity of the right to possess any species of property.** It may arise out of what was before an estate in severalty, by either a grant or devise of such estate to two or more persons, or by a grant of an undivided part thereof to one person, by virtue of which the grantor and the grantee would become cotenants with each other. It may result from a divorce by which lands before held by entireties, or as community property, become the property of the former spouses, in separate but undivided moieties.<sup>3</sup> It is also called into being by such a destruction of a “joint-tenancy or coparcenary as does not sever the unity of the right to possession. And so, upon the

<sup>1</sup> *De Witt v. San Francisco*, 2 Cal. 298; *N. Y. & S. Canal Co. v. Fulton Bank*, 7 Wend. 412.

<sup>2</sup> *Higbee v. Rice*, 5 Mass. 350.

<sup>3</sup> *McLeran v. Benton*, 31 Cal. 29.

dissolution of a copartnership, the assets of the firm, though subject to the discharge of the partnership liabilities, are held by tenancy in common.<sup>1</sup> Upon the bankruptcy of one, his assignee becomes a tenant in common with the other partners.<sup>2</sup>

§ 93. **Creation by Transfer of Part.**—A conveyance by a grantor, in which the premises conveyed are described as “one-half of my lot,” is sufficient to pass the title to the undivided one-half of the lot, and therefore to create a tenancy in common.<sup>3</sup> Tenancy in common may also be created in personal estate by the transfer, by an owner in severalty, of an undivided interest therein. So, while a promissory note cannot be parcelled out, so as to make the payer liable to distinct actions by different assignees, the holder may sell undivided interests in the note to different persons, who thus become co-owners, whose rights among one another, and as against third persons, are governed by the law applicable to tenancy in common.<sup>4</sup>

§ 94. **Created by Contract for Shares.**—If a contract be entered into whereby one of the contracting parties, in consideration of some service to be performed, is to become the owner of some share in any kind of property, the contractors thereby are made tenants in common with each other.<sup>5</sup> Thus, where A undertook to save certain iron from a wreck, and B, the owner of the iron, agreed to give A, as compensation for his services, a certain per cent. of the property saved, it was held that A became tenant in common of all iron taken by him from the wreck.<sup>6</sup> And so where money was advanced to the builder of certain carding-machines, upon an agreement that the person so advancing should have an interest in the machines equal to the amount furnished by him, he was adjudged to be a part owner, as tenant in common with the builder, from the time the advance was made.<sup>7</sup> A delivery of

<sup>1</sup> *Murray v. Mumford*, 6 Cow. 441.

<sup>2</sup> *Halsey v. Norton*, 45 Miss. 703.

<sup>3</sup> *Lick v. O'Donnell*, 8 Cal. 59; *McCaul v. Kilpatrick*, 46 Mo. 494.

<sup>4</sup> *Conover v. Earl*, 26 Iowa, 169.

<sup>5</sup> *White v. Brooks*, 43 N. H. 402.

<sup>6</sup> *Boylston Ins. Co. v. Davis*, 68 N. C. 20.

<sup>7</sup> *Beaumont v. Crane*, 14 Mass. 400.

stock to be fattened on the shares, creates a tenancy in common, so that neither of the parties can lawfully appropriate any of such stock to his own use;<sup>1</sup> and a like result follows where two or more persons jointly manufacture timber which is thereafter to be divided between them.<sup>2</sup>

§ 95. **Tenancy in Common from Confusion of Goods.**—Whenever the personal property of two or more persons has become so intermingled that neither can designate his portion, they are tenants in common, unless one of them has, by his participation in the production of the mixture, entirely forfeited his rights to the portion which was his. Where a number of bushels of grain is sold out of a larger amount, but no severance is made of the sold from the unsold portion, the vendor and the vendee become tenants in common of the whole grain, in proportion to their respective interests.<sup>3</sup> A confusion of goods is such an intermixture of the goods of different persons that neither can afterwards distinguish his own. It may therefore occur with every kind of personal property, not so peculiarly marked as to render it distinguishable from other property of the same class. Hence, when the logs of different mill-owners become so mixed that neither can tell which is his, they become tenants in common of the property so intermingled.<sup>4</sup> The authorities in regard to the circumstances under which an owner forfeits his goods by mixing them with the goods of others, are not entirely consistent with one another. Where the mixture is by mutual assent, there is no doubt that neither forfeits anything, and that both become tenants in common.<sup>5</sup> If the party occasioning the confusion is an agent whose duty it is to keep his goods distinct from those of his principal, he is liable for all resulting loss, and probably forfeits his title to the confused articles.<sup>6</sup> But when the party causing or making the mixture does so by some accident or mistake, and not intending any wrong, he

<sup>1</sup> *Sheldon v. Skinner*, 4 Wend. 530.

<sup>2</sup> *Wiggins v. White*, Ber. (New Brunswick) 97; *Kerr v. Connell*, Ib. 133.

<sup>3</sup> *Cushing v. Breed*, 14 Allen, 880.

<sup>4</sup> *Hesseltine v. Stockwell*, 30 Me. 241.

<sup>5</sup> *Nowlen v. Colt*, 6 Hill, 461.

<sup>6</sup> *Story on Agency*, sec. 205; *Hall v. Page*, 4 Geo. 436; *Wren v. Kirten*, 11 Ves. 379; *Lupton v. White*, 15 Ves. 442; *Fletcher v. Walker*, 3 Madd. 46; *Hart v. Ten Eyck*, 2 Johns. Ch. 108; *Willard v. Rice*, 11 Met. 493.

does not forfeit his right to his share, unless, perhaps, in a case where the new mixture or compound is of different value from the original parts. If the articles mixed together are of equal value, and when mingled, remain of the same condition as before, each party may obtain his own by taking such proportion as he had furnished to the mixture. Therefore, neither party is injured, and there is no sufficient reason for the forfeiture of the interest of the person in fault. "But, if articles of different values are mixed, producing a third value, the aggregate of both, and, through the fault of the person mixing them, the other party cannot tell what was the original value of his property, he must have the whole."<sup>1</sup> Judge Story, from a consideration of the various decisions on this subject says: "The conclusion to be drawn from these decisions and other authorities seems to be, that, in cases of negligent and inadvertent mixtures, (perhaps even of wilful mixtures,) if the goods can be easily distinguished and separated, then no change of property takes place, and each party may lay claim to his own. If the goods are of the same nature and value, although not capable of actual separation by identifying each particular, yet, if a division can be made of equal value, (as in case of a mixture of corn, or coffee, or tea, or wine, of the same kind and quality,) then each may claim his aliquot part. But if the mixture is undistinguishable, and a new ingredient is formed, not capable of just appreciation and division according to the original rights of each, then the party who occasions the wrongful mixture must bear the whole loss."<sup>2</sup>

§ 96. **Arises where the part of each Owner is not Located.**—As tenancy in common may arise from such a confusion of goods that neither owner can designate and reclaim his own, so it may exist whenever the title of real estate is such that neither of the owners can locate his part. If the owner of a tract convey a number of acres, less than the whole, without any designation of their locality, the grantee thereby acquires an interest in the whole tract, as a tenant in common

<sup>1</sup> *Lupton v. White*, 15 Ves. 442; *Ryder v. Hathaway*, 21 Pick. 306; *Hesseltine v. Haswell*, 30 Me. 241; *Pratt v. Bryant*, 20 Vt. 337.

<sup>2</sup> *Story on Bailments*, sec. 405.

with the grantor.<sup>1</sup> The interest of the grantee in the whole tract is in the proportion which the number of acres conveyed to him bears to the whole number; and entitles him to all the rights and remedies incident to a tenancy in common.<sup>2</sup> It is immaterial by what means the interest is created, so long as it remains unsegregated. Hence, where a defendant was entitled to a homestead of a specified value out of a tract of land which had been sold under execution, it was held that as the purchaser owned all in excess of the homestead limit of value, and the defendant owned all within that limit, and as neither had a claim to any specific portion, they were tenants in common in proportion to the value of their respective interests.<sup>3</sup> A parcel of land having been assessed, as in severalty, one of its owners paid upon a number of acres equivalent to his interest, leaving a residue of thirty-six acres delinquent. Subsequently, a tax deed issued in pursuance of a sale for such delinquency, and purporting to convey thirty-six acres of the whole tract. This deed was claimed to be void, on the ground that it conveyed a tract in severalty, by so indefinite a description that it could not be located. But the Court took a different view, concluding that as no specific part of the larger tract was designated, and that as no metes or bounds were named, the deed was not an attempted conveyance in severalty but a valid transfer of an undivided interest.<sup>4</sup> An early case in Vermont seems to be inconsistent with the general current of the authorities on this subject; and can only be reconciled with later cases in the same State, on the supposition that the Court may have deemed the description sufficiently exact to pass the title to a parcel in severalty.<sup>5</sup> Deeds of an unsegregated number of

<sup>1</sup> *Gibbs v. Swift*, 12 Cush. 898; *Jewett v. Foster*, 14 Gray, 495; *Battel v. Smith*, 14 Gray, 497; *Jackson v. Livingston*, 7 Wend. 141; *Payne v. Parker*, 1 Fairf. 178; *Small v. Jenkins*, 16 Gray, 155. But if a deed purports to convey a small tract within a larger one, and purports to describe the smaller tract, and the description is so imperfect that land intended cannot be located, the grantee does not acquire an interest in the larger tract as a tenant in common thereof. (*Grogan v. Vache*, 45 Cal. 610.)

<sup>2</sup> *Lawrence v. Ballou*, 37 Cal. 518; *Schenck v. Evoy*, 24 Cal. 104.

<sup>3</sup> *Silloway v. Brown*, 12 Allen, 35.

<sup>4</sup> *Sheafe v. Wait*, 30 Vt. 736.

<sup>5</sup> *Clapp v. Beardsley*, 1 Vt. 162. This case, in so far as it may imply that a grant of an unsegregated part does not make the grantee a tenant in common, is overruled by *Preston v. Robinson*, 24 Vt. 583.

acres, in a larger tract, are sometimes made, containing a provision or stipulation that the part granted shall be thereafter located. In such case, though it is evident that the parties do not intend a permanent cotenancy, they become tenants in common upon the execution of the conveyance, and so continue until the location is made, or the joint right of possession is otherwise destroyed.<sup>1</sup> Where land was devised to A and B, A to have the southern and B the northern part, but there was nothing by which the division line between their portions could be fixed, they were held to be tenants in common.<sup>2</sup> But in Pennsylvania, the decisions in regard to the interests of persons holding under a survey, are irreconcilable with the general rule that those persons must be regarded as tenants in common whose titles are such that neither can point out his portion. In that State, it seems that two or more persons intending to procure title from the State, and having adjoining claims, could have a survey made of the exterior boundaries, so as to include all their claims, without designating what part of this large survey either claimant should have. The survey so made gave the claimants a right to the possession as against third persons; but it did not furnish any means of determining the rights of the claimants as between themselves. Upon common law principles, we should suppose them to be tenants in common, because, in the aggregate, they were entitled to the whole, and each seemed to be equally entitled to every part. They were, however, held not to be cotenants, but owners in severalty, with their rights suspended, and liable to remain so, until proceedings were consummated establishing the boundaries of each claimant's land.<sup>3</sup>

§ 97. **Trees on or near the Line.**—"A tree standing upon the division line between adjoining proprietors so that the line passes through the trunk or body of the tree above the surface of the soil, is the common property of both proprietors, as tenants in common. This is an instance where

<sup>1</sup> *Anderson v. Donelson*, 1 Yerg. 198; *Lawrence v. Ballou*, 37 Cal. 518; *Jackson v. Livingston*, 7 Wend. 141; *Corbin v. Jackson*, 14 Wend. 621; *Wood v. Fleet*, 36 N. Y. 503.

<sup>2</sup> *Walker v. Dewing*, 8 Pick. 520.

<sup>3</sup> *Ross v. McJunkin*, 14 Serg. & R. 364.



the maxim that he who owns the land, owns to the sky above it, is qualified and made to give way to a rule of convenience more just and equitable, and more beneficial to both parties. To hold in such case that each is the absolute owner of that part of the tree standing on or over his own land, would lead to a mode of division of the tree when cut, that would be impracticable, and give the right to one to hew down his part of the tree to the line, and thereby destroy the part belonging to the other. The rule is therefore settled that in such case the parties are tenants in common."<sup>1</sup> The law in regard to trees whose trunks stand across the division line seems to be free from doubt; but the same cannot be said of the law defining the ownership of those trees which stand at one side of the line, having their roots on both sides, and drawing their nourishment from the soil of both proprietors. "It was ruled by Holt, Chief Justice, upon a trial at *Nisi Prius*, 1697-8, that if A plant a tree upon the extremest limits of his land, and the tree growing extend its root into the land of B next adjoining, A and B are tenants in common of this tree. But if all the root grows into the land of A, though the boughs overshadow the land of B, yet the branches follow the root, and the property of the whole is in A."<sup>2</sup> The portion of this opinion affirming that the joint nourishment of a tree by the lands of adjoining proprietors makes it the property of both, was supported by at least another early case,<sup>3</sup> and was approved and adopted by some of the writers of elementary treatises.<sup>4</sup> But the rule as laid down by Chief Justice

<sup>1</sup> *Skinner v. Wilder*, 38 Vt. 117; *Holder v. Coates*, 22 Eng. C. L. 485; 1 *Moody & Malkin*, 112. But Hogeboom, J., in *Relyea v. Beaver*, 84 Barb. 550, dissents from the current of authorities, and expresses his views as follows: "Ordinarily, the established boundary line between adjoining owners of land is the true and only test to determine the title to the land on either side and of all below and above it, from the center of the earth to the heavens. I do not know that there is any exception to the rule in regard to the earth or its natural productions. The growth from the soil, whether it be the grass and herbage, the plants and bushes, or the more lordly trees, must, I think, share the same fate, and belong to the person on whose soil they grow. If they grow partly on the soil of one, and partly on the soil of another, I do not see that the rule is altered. The portion that grows on the land of each must belong separately to him, and not partly to him and partly to his neighbor." This case must be regarded as overruled by a later decision in a higher court. (See *Dubois v. Beaver*, 25 N. Y. 124.)

<sup>2</sup> *Waterman v. Seper*, 1 Ld. Raym. 737.

<sup>3</sup> *Anonymous Case*, 2 Roll. 255.

<sup>4</sup> *Bul. N. P.* 84; 3 *Starkie Ev.* 1457 n.



Holt is opposed by both earlier and later English adjudications,<sup>1</sup> and finds little or no support on this side of the Atlantic. In fact, the American decisions seem to be unanimous in awarding the sole ownership of the tree, including its overhanging branches, to him on whose land its trunk stands.<sup>2</sup> This position is supported by the general rule that the owner of the land is entitled to all above it, and also by general considerations of expedience and certainty. If every man who has trees standing near the boundaries of his land be compelled to ascertain in what direction their roots run, and from what source their nourishment comes, how can he know or ascertain what he owns solely and what in common, and in what proportion, especially as the rights of the parties are constantly changing by the growth and consequent extension of roots across the division line?

§ 98. A party wall, in being situated on the lands of two adjoining proprietors, resembles in this respect a tree growing upon and across a boundary line. From this close analogy existing between the two, we should naturally expect an analogy between the adjudications determining the tenancy by which each is held. If the general principle of law that the owner of real estate is also the owner of everything upon and above it, partaking of the character of realty, is to be enforced or rejected in one case, it ought to be so enforced or rejected in the other. A consultation of the authorities disappoints our reasonable expectations on this subject. If it appear that a party wall exists, and no showing be made as to the character or extent of the interests of the owners thereof, the Court will, on account of the common user of the wall, presume, until the contrary be proved, that both the wall and the ground beneath it, are held by the parties as tenants in common.<sup>3</sup> But whenever a several ownership of the soil beneath the wall is established, this presumption ceases, and the wall is conceded to belong in severalty to the adjoining proprietors, the ownership of each extending to the dividing

<sup>1</sup> *Masters v. Pollie*, 2 Roll. Rep. 141; *Holder v. Coates*; 1 Moody & Malkin, 112; 22 E. C. L. 485; *Norris v. Baker*, 3 Bulstr. 178; *Millen v. Fandrye*, Pop. Rep. 161.

<sup>2</sup> *Lyman v. Hale*, 11 Conn. 177; *Dubois v. Beaver*, 25 N. Y. 126; *Skinner v. Wilder*, 38 Vt. 117; *Griffin v. Bixly*, 12 N. H. 454.

<sup>3</sup> *Wiltshire v. Sedford*, 1 Man. & R. 404; *Cubitt v. Porter*, 8 Barn. & C. 257.

line of their respective lands. But the title to that part of the wall thus conceded to each proprietor, is subject to and qualified by an easement existing in favor of the other, and securing to him the right to use the whole of the wall for the support of the building upon his land.<sup>1</sup> Where a person owning two houses, which have a division wall between them necessary to the support of both, conveys the lot on which one of the houses is situated, including in his conveyance the land up to a line beneath the wall, he thereby makes a party wall charged with an easement in favor of both grantor and grantee.<sup>2</sup> "The general rule of law is, that when a house or store is conveyed by the owner thereof, everything then belonging to and in use for the house or store, as an incident or appurtenant, passes by the grant. It is implied from the nature of the grant, *unless it contains some restriction*, that the grantee shall possess the house in the manner, and with the same beneficial rights, as were then in use and belonged to it."<sup>3</sup> "If the owner of two adjoining lots erect buildings on them, with a wall partly on each, to be used as a support of both buildings, and which is necessary to furnish such support, and which is used for that purpose from the time of its erection, a conveyance of either house and lot, with its appurtenances, grants an easement for the support of the house so conveyed, in so much of the wall as stands on the other lot."<sup>4</sup> The owner of a lot on which he had erected two buildings, with a common or party wall between them, conveyed, by deeds executed and recorded on the same day, the easterly part of the lot to one person and the westerly part to another. The description contained in these deeds so located the division line between these two grantees, that the whole of the land on which the wall stood, and two inches beyond it, fell within the boundaries of the grantee of the easterly part. An action of ejectment was subsequently brought against the grantee of the westerly part to recover possession of the land

<sup>1</sup> *Eno v. Del Vecchio*, 4 Duer, 60; *Murly v. McDermit*, 8 Adol. & E. 138; *Sherred v. Cisco*, 4 Sandf. 485; *Brooks v. Curtis*, 50 N. Y. 642; *Hendricks v. Stark*, 87 N. Y. 110; *Brown v. Pentz*, 11 N. Y. Leg. Obs. 24.

<sup>2</sup> *Partridge v. Gilbert*, 15 N. Y. 605; *Webster v. Stevens*, 5 Duer, 556; *Richards v. Rose*, 24 E. L. & E. 406; 9 Exc. 218; 17 Jur. 1086; 23 L. J. R. (N. S.) Exc. 8.

<sup>3</sup> *United States v. Appleton*, 1 Sumn. 500.

<sup>4</sup> *Eno v. Del Vecchio*, 4 Duer, 65; 6 Duer, 17.

on which the wall rested, together with the two inches beyond it. In determining this action, the Court held that: "Assuming that the plaintiff is right in his construction of the description, yet the wall being a party wall, and, at the time of the conveyance, serving as a support for the beams of the house erected on the lot now of the defendant, the premises now owned by the plaintiff were charged with the servitude of having the beams of that house supported by the wall in question, and of having the wall stand and serve as an exterior wall for the defendant's house, so long, at least, as the buildings should endure.

"This servitude was both continuous and apparent, being one which would be discovered on an inspection of the premises by one reasonably familiar with the subject. A mere measurement of the house would have disclosed it. Consequently, on the severance of the two properties, the grantee of the westerly lot acquired an easement corresponding with the servitude to which the easterly lot was subject. The right to use the wall as a party wall necessarily carried with it the right to occupy the space of two inches intervening between the wall and the easterly boundary of the defendant's lot, with the timbers which were to find support in the wall, and to have the building and wall remain as they were at the time of the conveyance, at least so long as the building and wall should endure."<sup>1</sup>

§ 99. **Proprietaries.**—A very considerable portion of the New England States was originally held under titles acquired by grants made by the colonial legislatures of a township or other large tract of land, to a *number of proprietors*. The estate thereby created was no doubt a tenancy in common.<sup>2</sup> But these grantees or settlers managed their common property by assembling and passing votes and orders in regard thereto. In that manner, they admitted new members, upon payment of certain sums, and divided the lands as they thought right among those entitled. By force of custom and of general regulations for their government, these proprietaries seem to have acquired and exercised in regard to their

<sup>1</sup> Rogers v. Sinsheimer, 50 N. Y. 648.

<sup>2</sup> 2 Dane's Ab. 698.

property the general powers of corporate bodies. But the members, as between themselves, retained some of the rights of tenants in common. Each could compel a partition by legal process, unless the proprietary, before the entry of the decree, had made a voluntary partition. Such voluntary partition was valid, though made pending an action instituted by a member for the same purpose. Each member could convey or devise his interest, or any part thereof; and his grantee, heir, or devisee, became entitled to all the rights of an original member of the proprietary.<sup>1</sup>

§ 100. **Tenancy in Common in Crops.**—Every form of agreement by which land is let to one who is to cultivate the same and give the owner as compensation therefor a share of the produce, creates a tenancy in common in the crops.<sup>2</sup> An arrangement to cultivate land on the shares is not a lease. Landlords, therefore, favor this mode of letting their lands, because they thereby acquire an interest in the produce of the land, whereas if such an agreement constituted a complete lease, the title to the crop produced would vest in the occupier, and the landlord would have no claim upon it until a division was made, and then his share would come to him as rent.<sup>3</sup> “Where the reservation is of an undivided share, the property of that share is always in the lessor by virtue of his reservation, while the property of the residue is always in the tenant by the implied grant of profits, and they are therefore tenants in common of the crop until division.”<sup>4</sup> “The true test seems to lie in the question, whether there be any provision, in whatever form, for dividing the specific products of the premises. If there be, a tenancy in common arises, at least in such products as are to be divided.”<sup>5</sup>

<sup>1</sup> 2 Dane's Ab. 698; Angell & Ames on Corp. secs. 205 and 214; *Chamberlain v. Bussey*, 5 Greenl. 170; *Mitchell v. Starbuck*, 10 Mass. 20; *Folger v. Mitchell*, 3 Pick. 396; *Williams College v. Mallett*, 3 Fairf. 401.

<sup>2</sup> *State v. Jewell*, 34 N. J. Law. 259; *Hurd v. Darling*, 14 Vt. 220; *Williams v. Nolen*, 34 Ala. 167; *Otis v. Thompson*, Hill & Denio, 131; *Maverick v. Lewis*, 3 McCord, 212; *Strother v. Butler*, 17 Ala. 733; *Jackson v. Brownell*, 1 Johns. 267; *Dinehart v. Wilson*, 15 Barb. 595; *Herskell v. Bushnell*, 37 Conn. 43.

<sup>3</sup> *Guest v. Opdyke*, 31 N. J. Law, 554; *Foot v. Colvin*, 3 Johns. 215.

<sup>4</sup> *Hatch v. Hart*, 40 N. H. 98; *Carr v. Dodge*, 40 N. H. 407; *Taylor v. Bradley*, 39 N. Y. 140.

<sup>5</sup> *Putnam v. Wise*, 1 Hill, 247; *Brown v. Lincoln*, 47 N. H. 468.

§ 101. **Where the Agreement is to Divide the Profits.**—In the cases where the agreement provides for a division of the produce itself, it is quite obvious that all the materials necessary to create a tenancy in common are present as soon as any crop is grown. But there may be agreements contemplating a sale of the crops and a division of the moneys arising therefrom. Thus A was to cultivate B's plantation, and to furnish means so far as he was able. What means A could not provide were to be furnished by B. At the end of the year, B was to sell the crop, and have one-third, and then deduct all expenses and pay the residue to A. This agreement was held to be neither a leasing of land nor a hiring of labor, but a joint cultivation on account of both parties, "with a particular provision for disposing of the crop in a convenient time and manner, in order to close the transaction, by paying the expenses out of the proceeds, and dividing the residue in the proportions agreed on."<sup>1</sup> Very similar to this agreement was one made in New York, by which T, a landowner, was to account to and pay one H, *the value* of one-half of all grain, butter, and net proceeds that might be produced on the land. The Supreme Court of that State, in determining the effect of this agreement, said: "The circumstance that the contract provided that T was to pay the value instead of dividing the crops, does not alter the case. The principle is the same, whether H furnished or delivered one-half the products, or T took them and sold them, and paid one-half of their value. The point is that there was to be a division, and that the occupier or cultivator was not to pay a certain number of bushels of grain, or a certain number of tons of hay, as rent of the premises, so as to make him a tenant. This provision as to a division was but a mode of ascertaining the value and dividing the proceeds."<sup>2</sup> In another case, cotton was to be raised and sold, and after the sale, the expenses were first to be paid, before any division of the proceeds. The Court before which this case was brought, thought that the test by which to determine whether such an agreement resulted in a tenancy in common, was to inquire whether, by

<sup>1</sup> Moore v. Spruill, 18 Ired. 56.

<sup>2</sup> Tanner v. Hills, 44 Barb. 490; Wilber v. Sisson, 53 Barb. 202.

the terms of the contract, both parties were entitled to be in possession of the crop before the sale or division was made. That if the contract did not by its terms necessarily exclude one of the parties from the right to the possession; or, if though giving one the right to make the sale, it did not confer on him the exclusive possession, then, as in other cases where a joint right to possession existed, the parties were tenants in common.<sup>1</sup> B and other farmers delivered milk to a cheese factory: each was credited with the amount of his milk: the milk was mixed and manufactured into cheese; the factory company was to sell the cheese and to divide the proceeds among the farmers in proportion to the milk furnished by each, first deducting a certain amount, to pay for the manufacturing. It was held that, under this agreement, B was not a tenant in common of the cheese, and that the transaction constituted "a sale of the milk to the factory, for which they were to pay at a certain time and in a certain manner," and converted B's interest "into a mere demand for the price of the product as agreed upon."<sup>2</sup>

§ 102. **Simultaneous Mortgages.**—Two tenants in common, V and D, agreed to sell their property to R. Part of the purchase money was to be paid upon the execution of the deed, and the balance was to be secured by separate mortgages in favor of each of the cotenants for his share of the unpaid purchase money. The mortgage in favor of V was executed and recorded before the mortgage to D was executed. The sale of the premises, together with the terms and mode of payment, were the result of a prior written contract between V and D. This contract was considered as "the embryo life of the mortgages subsequently executed." And as each mortgage had a common inception, and each mortgagee had, during all the time, full knowledge of the rights of the other, they were held to stand "upon an exact equality," and to be entitled to equally share the proceeds of the mortgaged premises.<sup>3</sup> In this case, while the execution of the mortgages was not in fact simultaneous, yet it was so

<sup>1</sup> Thompson v. Mawhinney, 17 Ala. 368.

<sup>2</sup> Butterfield v. Lathrop, 71 Pa. St. 225.

<sup>3</sup> Daggett v. Rankin, 31 Cal. 322.

regarded because it had its origin in a common contract. If the mortgages took effect by relation, at the time of the execution of the contract, so as to be placed on an equal footing as to time, then there can be no doubt that neither had any precedence over the other. Simultaneous mortgages, whether real or chattel; of which both the mortgagees have notice, can have no rank over each other. The two separate mortgagees are therefore treated as though they were tenants in common of one mortgage, and are allowed equal benefit of their security.<sup>1</sup> But they have not, as mortgagees in common, such an estate that they can maintain an action for partition.<sup>2</sup>

§ 103. **Simultaneous Conveyances.**—The same principles which impel Courts to treat simultaneous mortgages with equal favor, operate with like effect upon simultaneous conveyances, and upon all cases where two or more parties have acquired an equally good title to the same property. Where neither has the superior title, but each has a title which, but for the other's, would be perfect, they are tenants in common. A testator having separate patents, supposed himself to be owner of two distinct parcels of land. The larger parcel he devised to one daughter, and the smaller parcel to another daughter. The smaller parcel was afterwards found to be included within the larger. It was therefore within the devise to each daughter, and was adjudged to belong to them equally as tenants in common.<sup>3</sup> Where land is levied upon under writs of execution or of attachment, and it cannot be ascertained that either levy preceded the other, subsequent sales under the different levies will make the purchasers thereunder tenants in common.<sup>4</sup> So, if two patents be made of even date, on surveys recorded the same day and purporting to be by virtue of warrants issued on the same day, both including the same ground, the patentees are tenants in common.<sup>5</sup>

§ 104. **Where a voluntary, unincorporated association**

<sup>1</sup> Welch v. Sackett, 12 Wis. 253; Beers v. Hawley, 2 Conn. 469; Ewer v. Hobbs, 5 Met. 1.

<sup>2</sup> Ewer v. Hobbs, 5 Met 1.

<sup>3</sup> Seckel v. Engle, 2 Rawle, 68.

<sup>4</sup> Shore v Dow, 13 Mass. 529.

<sup>5</sup> Young v. De Bruhl, 11 Rich. Law, 641.



is formed, and acquires property, the members thereof are tenants in common of such property, each having an equal interest therein.<sup>1</sup> But, in Massachusetts, a religious society, acting in a parochial capacity, may, though unincorporated, receive a grant of real estate, and use and manage it for the ordinary purposes of such society. Therefore, a grant to such a society vests the title in it as a body, instead of creating a tenancy in common between the several members.<sup>2</sup>

§ 105. **Presumption of Relative Interests.**—If a tenancy in common be established, but no proof is made in regard to the relative interests of the several cotenants, the presumption of law arises that their shares are equal.<sup>3</sup> If it be shown that title has been acquired by a deed executed by two or more, as grantors, a like presumption arises that these several grantors were tenants in common of equal interests.<sup>4</sup> A levy was made by an officer upon process issued against A. It was shown that A and B were cotenants of a tract of land. The return of the officer certified that he had levied upon the undivided one-half of this tract. This return was objected to, on the ground that it did not properly describe A's interest. But the Court held that because of the deed to A and B, the officer had, in the absence of other information, a right to presume that the interest of each was an undivided one-half, and that the levy must be sustained, at least until an affirmative showing was made that A's interest was different from what it had been presumed to be.<sup>5</sup>

§ 106. **Presumption of, does not necessarily arise from Joint Deed.**—The introduction of deeds from a common grantor to a plaintiff and defendant respectively, purporting to convey an undivided interest in the subject-matter of a suit, does not create the presumption that the parties are tenants in common. “The mere production of a deed from a stranger

<sup>1</sup> *Higgins v. Riddell*, 12 Wis. 587; *Benjamin v. Stremple*, 13 Ill. 466.

<sup>2</sup> *Hamblett v. Bennett*, 6 Allen, 144.

<sup>3</sup> *Jarrett v. Johnson*, 11 Gratt. 327; *Edwards v. Edwards*, 39 Pa. St. 369; *Shields v. Stark*, 14 Geo. 429.

<sup>4</sup> *Dashiel v. Collier*, 4 J. J. Marsh. 602.

<sup>5</sup> *Baker v. Shepherd*, 37 Geo. 15.



is not sufficient to show either that *he* had title, or that the grantee entered under or holds in subordination to his deed. The deed may have been taken merely to quiet a better title or to fortify a possession already taken under a precedent and better claim."<sup>1</sup> A person in possession of land may protect himself from litigation by purchasing any outstanding claim against his property. By so purchasing, he does not necessarily admit the superiority of the title bought, nor change his possession, which was before adverse, into a possession subordinate to the newly acquired title.<sup>2</sup> Therefore, one who is in possession of real estate, does not become a tenant in common thereof, by merely accepting a deed therefor from the owner of an undivided interest therein.<sup>3</sup>

§ 107. "**Lands held in common are subject to Dower.**"<sup>4</sup>—The right of the wife to dower is subject to the right of the cotenants of her husband to compel partition of the land. Upon such partition, her claim for dower is confined to the part which has been assigned to him in severalty. Under what circumstances and to what extent her rights may be affected by a partition, whether voluntary or involuntary, to which she is not a party, will be considered in another part of this work.

§ 108. **Widow entitled to Dower is not a Tenant in Common.**—A widow entitled to dower did not, at common law, have any estate in the lands until assignment.<sup>5</sup> She was not entitled to joint possession with the heirs; therefore, she was not a tenant in common. But wherever the common law has been succeeded by statutory enactment, or by judicial construction, under which the widow, at the death of her husband, has the right to the possession of one-third of his real estate, there she is a tenant in common with the heirs. In such case, "her right of entry does not depend upon the

<sup>1</sup> Woodbeck v. Wilders, 18 Cal. 136.

<sup>2</sup> Cannon v. Stockmon, 36 Cal. 539; Schuhman v. Garratt, 16 Cal. 100; Sparrow v. Kingman, 1 N. Y. 246; Watkins v. Holman, 16 Pet. 53.

<sup>3</sup> Jackson v. Smith, 13 Johns. 406.

<sup>4</sup> Scribner on Dower, 326; Ham v. Ham, 14 Q. B. (Upper Canada) 497; Sutton v. Rolfe, 3 Lev. 84; Davis v. Bartholomew, 3 Ind. 485; Brown v. Adams, 2 Whart. 183.

<sup>5</sup> 4 Kent Comm. 62.

assignment of dower, which is a mere severance of the common estate."<sup>1</sup>

§ 109. **Lapse of Devise or Bequest to.**—A bequest or devise to two or more persons, under which, if both survived the testator, they would become tenants in common, will lapse as to the share of the one dying before the testator. The survivor can take only the moiety devised or bequeathed to him, and can gain nothing by the decease of him who, had he outlived the testator, would have taken the other moiety.<sup>2</sup> The same principle is applicable to a conveyance to two or more as tenants in common, when one of them is dead. In Kentucky, a patent for certain lands was made by the State to Y and T, the latter having died prior to the issuing of the patent. Of the effect of this patent, the Court of Appeals said: "Whatever may have been the case, if Y had been a joint-tenant, to whom the land would have went by operation of law as survivor, (a point we need not now consider,) we conceive that the whole title did not pass to Y by the emanation of this grant. It is clear that no title could pass to a person not in existence; and it is equally clear that the intention of the State by this grant was to pass one undivided moiety to Y and the other to T in common; and to say that the State, although a grant of title was intended, passed it to a person not intended or named as taking, is construing the grant beyond its letter or spirit. If the whole was intended in moieties to each of two different persons, as was supposed, when there was but one in fact, there can still be no reason why that one should take either less or more than was intended or expressed."<sup>3</sup> If a bequest be made to two or more as tenants in common, and the testator thereafter revoke the

<sup>1</sup> *Stedman v. Fortune*, 5 Conn. 462; *Stokes v. McAllister*, 2 Mo. 163; *C. & A. Turnpike Co. v. Jarrett*, 4 Ind. 215; *Wooster v. H. L. Iron Co.* 38 Conn. 256; *Crocker v. Fox*, 1 Root, 828.

<sup>2</sup> *Bagwell v. Dry*, 1 P. Wms. 700; *Page v. Page*, 2 Ib. 489; *Peat v. Chapman*, 1 Ves. Sr. 542; *Bain v. Lescher*, 11 Sim. 397; *Bradley v. Wilson*, 13 Grant's Ch. (Upper Canada) 642; *Frazier v. Frazier*, 2 Leigh, 642; *Nelson v. Moore*, 1 Ired. Eq. 31; *Commonwealth v. Nase*, 1 Ashmead, 242; *Goodright v. Opie*, 8 Mod. 128; *Barker v. Giles*, 9 Mod. 157; *Sperling v. Toll*, 1 Ves. Sr. 70; *Reade v. Reade*, 5 Ves. 744; *Owen v. Owen*, 1 Atk. 494; *Jackson v. Kelley*, 2 Ves. Sr. 285; *Easum v. Appleford*, 5 Myl. & Cr. 62; *Norman v. Frazer*, 3 Hare, 84; *Hester v. Hester*, 2 Ired. Eq. 330; *Craighead v. Given*, 10 Serg. & R. 351.

<sup>3</sup> *Currie v. Tibb's Heirs*, 5 Monr. 443.

'share of one of them, such share does not go to the other legatees, but to the testator's next of kin. Thus, a testator gave the residue of his estate to his three children, a daughter and two sons, "share and share alike, as tenants in common, and not as joint-tenants." He afterwards, by a codicil, revoked his "daughter from being one of his residuary legatees," and gave her in lieu thereof £500 in New South Sea annuities;" "and in all other things he confirmed his will." It was argued that this revocation made the will the same as though she had never been named as a residuary legatee, and that it was clear that the testator meant to dispose of his whole estate. But the Court of Chancery adopted the construction that the sons were residuary legatees "of only two parts in three;" and this construction was affirmed on appeal to the High Court of Parliament.<sup>1</sup>

§ 110. **Gift to a Class.**—The rules stated in the preceding section prevail, because where the testator has designated that each of the co-legatees shall receive a moiety, the Courts presume that he intended to confine his bounty to such moiety. But if, from the will, a different intent appears, the Courts will carry it into effect. Thus, if a gift be made to a class, as to the children of A, without naming any of them, here there can be no doubt that the testator desires to benefit all the children which A may have at the time of the vesting of the legacy. In such case, no part of the legacy lapses, on account of the death of some of A's children prior to that of the testator. Although the terms of the bequest are such as to create a tenancy in common, still the children of A, living at the vesting of the bequest, take the entire legacy.<sup>2</sup> But in order to accomplish this result, the devise or bequest must be to *a class* and not to *specified persons* who may together happen

<sup>1</sup> Cheslyn v. Cresswell, 3 Bro. C. P. 246; 2 Eden. 128, S. C.

<sup>2</sup> Pemberton v. Parke, 5 Binn. 607; Gross's Estate, 10 Pa. St. 361; Hawkins v. Everett, 5 Jones Eq. 43; Walker v. Williamson, 25 Geo. 554; Stires v. Van Rensselaer, 2 Bradf. 172; Lawrence v. Hebbard, 1 Bradf. 252; Viner v. Francis, 2 Bro. C. C. 658; S. C. 2 Cox, 190; Doe v. Sheffield, 13 East, 526; Pendleton v. Hoomes, Wythe, 94; Rogers v. Moore's Devisees, 4 B. Monr. 24; Thornhill v. Thornhill, 4 Madd. 377; Collins v. Johnson, 8 Sim. 356; Le Jeune v. Le Jeune, 2 Keen, 701; Gray v. Garman, 2 Hare, 271; Shuttleworth v. Greaves, 4 Myl. & Cr. 35; Castle v. Eate, 7 Beav. 296; Frierson v. Van Buren, 7 Yer. 606; Miles v. Boyden, 8 Pick. 213; Vaughan v. Dickens, 2 Dev. & Bat. Eq. 52; Young v. Robinson, 11 G. & J. 328; Swinton v. Legare, 2 McCord's Ch. 440.

to form a class. "A gift to a class implies an intention to benefit those who constitute the class, and to exclude all others; but a gift to individuals described by their several names and descriptions, though they may together constitute a class, implies an intention to benefit the individuals named. In a gift to a class, you look to the description and inquire what individuals answer to it; and those who do answer to it are the legatees described. But if the parties to whom the legacy is given be not described as a class, but by their individual names and additions, though together constituting a class, those who may constitute the class at any particular time may not, in any respect, correspond with the description of the persons named as legatees. If a testator give a legacy to be divided amongst the children of A at a particular time, those who constitute the class at the time will take; but if the legacy be given to B, C, and D, children of A, as tenants in common, and one die before the testator, the survivors will not take the share of the deceased child. The question must be, was the intention to bequeath to those who might, at the time, constitute the class, or to certain individuals who, it was supposed, would constitute it?"<sup>1</sup>

EFFECT OF PARTNERSHIP UPON REAL ESTATE HELD IN NAME OF  
PARTNERS AS TENANTS IN COMMON.

§ 111. **Difference between Partners and Cotenants.**—A partnership resembles a joint-tenancy in some respects. The partners have a joint interest in the assets of the partnership, and are required to sue and to be sued jointly in reference thereto. Upon the death of one, the others have a right of survivorship, entitling them to continue in the sole possession of the personal assets. This right is, however, but temporary, and practically amounts to nothing more than a power to wind up the concerns of the late firm. That power being executed, the representatives of the deceased copartner are entitled to his share of the remaining assets.<sup>2</sup> Partnership property is not held by those unities which, next

<sup>1</sup> *Barber v. Barber*, 3 Myl. & Cr. 697. See also to same effect, *Bain v. Lecher*, 11 Sim. 397; *Norman v. Frazer*, 3 Hare, 84; *Havergall v. Harrison*, 7 Beav. 49; *Hammatt v. Ledsam*, 9 Jur. 178; *Hustler v. Tilbrook*, 9 Sim. 368.

<sup>2</sup> *Dyer v. Clark*, 5 Met. 562.

to the *jus accrescendi*, are the chief characteristics of a joint-tenancy. In this latter respect, a partnership resembles a tenancy in common. But the two differ from each other in this, that the former creates a *joint*, and the latter a *several* interest. Partnership is distinguished from both species of cotenancy by the means and by the result of its creation. The means of its creation is necessarily an agreement between the parties; whereas neither joint-tenancy nor tenancy in common need rest upon any such agreement. The result of its creation is a relation between the parties, whereby each is the agent of the other, with authority to manage and dispose of the firm property, and to make all contracts within the scope of the business in which the firm was designed to engage. No such result arises from a joint-tenancy, nor from a tenancy in common. Partnership and tenancy in common also differ from each other in other important particulars. Each cotenant "buys in, or sells out, or encumbers his interest at pleasure, regardless of the knowledge, or consent, or wishes of his co-proprietors, and without affecting the legal relation between them, beyond the going out of one and the coming in of another. This cannot be done where a copartnership exists. One cannot buy in or sell out of a partnership at pleasure. Such an act would of itself work a dissolution of the partnership, and necessitate its final settlement and closing out. A tenancy in common results from a rule of law by which it is also controlled and governed. A partnership, on the contrary, is the result of an agreement between parties, which also supplies the rule for its government. The former relation is undisturbed by a change of tenants, but the latter admits of no change in its members; and where a change takes place by the consent and agreement of all the parties concerned, the old firm is thereby dissolved and a new one created. Thus the incidents annexed to each have a different origin and are diverse. Also, the proceedings for a dissolution of these relations are grounded upon entirely different facts. As to the first, the mere desire of one of the tenants is sufficient to set the Court in motion; but as to the latter, cause must be shown."<sup>1</sup>

<sup>1</sup> Bradley v. Harkness, 26 Cal. 77.

§ 112. **Effect at law of Partnership on Cotenancy of Realty.**—We have seen that copartnership and cotenancy differ from each other in the means of their creation and in the relations which they respectively produce between the parties in interest. A statement of even the general principles regulating the rights and duties of copartners, and controlling the final disposition of their assets, is not within the scope of this work. But it is well known that these principles are essentially different from the principles embodied in the law of cotenancy; and while this work does not involve any inquiry into the general law of copartnership, still it would be incomplete if it did not attempt to show under what circumstances, and for what purposes, property may be withdrawn from its subjection to the law of cotenancy, and placed within the dominion of the law of copartnership. Both at law and in equity, the personal assets of a firm are entirely subject to the law of partnership. This is too well settled to require any citation of authorities. Beyond this, these two systems of jurisprudence do not agree. The law does not admit that realty owned by two or more persons can be held other than in cotenancy. “The principles and rules of law applicable to partnerships, and which govern and regulate the disposition of the partnership property, do not apply to real estate. One partner can convey no more than his own interest in houses or other real estate, even where they are hold for the purposes of the partnership. There may be special covenants and agreements entered into between partners relative to the use and enjoyment of real estate held by them jointly, and the land would be considered as held subject to such covenants; and in the absence of all special covenants, the real estate owned by the partners must be considered and treated as such, without any reference to the partnership.”<sup>1</sup>

§ 113. **Realty held by Partners, how treated in Equity.**—That real estate, though held as a joint-tenancy, or as a ten-

<sup>1</sup> *Coles v. Coles*, 15 Johns. 159; *Thornton v. Dixon*, 3 Brown's Ch. 199; *Balmain v. Shore*, 9 Ves. Jr. 500; *Hoxie v. Carr*, 1 Sumn. 176; *Sigourney v. Munn*, 7 Conn. 11; *Peck v. Fisher*, 7 Cush. 390; *Andrews' Heirs v. Brown's Admr.* 21 Ala. 437; *Collumb v. Read*, 24 N. Y. 505; *Buchan v. Sumner*, 2 Barb. Ch. 165; *Miller v. Proctor*, 20 Ohio St. 448; *Peck v. Fisher*, 7 Cush. 386.

ancy in common, so far as the mere legal title is concerned, may, in equity, be treated as personalty, is well established by numerous authorities. But precisely what circumstances in regard to its use or acquisition will authorize such treatment, and whether, when authorized, the treatment shall continue for all purposes, or for some only, are matters upon which the decisions are not in full harmony. We shall first consider what realty, of which the legal title is held by two or more in undivided interests, may, in equity, be regarded as, for any purpose, withdrawn from the law of cotenancy; and, next, for what purposes, and to what extent this withdrawal may affect the control, enjoyment, and final disposition of the property.

§ 114. **Mere Purchase by Partners does not convert Realty into Personalty.**—The fact that the tenants in common of the legal title are also copartners does not of itself invest the realty with any of the characteristics of personalty. Nor is the fact that payment for such real estate was made out of the partnership funds, decisive of the question. The partners may have intended to draw that amount out of their firm business, and to invest and hold it as cotenants. Partners may, like other persons, join in a purchase of realty independent of their partnership, intending to hold their interests severally. Whenever such an intention exists, the property, though paid for out of the moneys or effects of the firm, retains in equity as well as at law the character of real estate.<sup>1</sup> “When the price of land conveyed to the partners is paid by copartnership money or effects, or it is taken in satisfaction of a debt due the concern, the real estate becomes partnership property, or is individual property according to the legal effect of the conveyance, as the intention of the purchasers shall appear to have been. It may be either the one or the other.”<sup>2</sup>

§ 115. **Presumption arising from Purchase with Firm Assets.**—Though the intention of the partners, rather than

<sup>1</sup> *Hunt v. Benson*, 2 Humph. 459; *Dyer v. Clark*, 5 Met. 562; *Smith v. Smith*, 5 Ves. 198; *Coder v. Huling*, 27 Pa. St. 88.

<sup>2</sup> *Collumb v. Read*, 24 N. Y. 518.



the means of payment, is the criterion by which to determine whether the realty acquired by them has been converted into the personal estate of the firm, still the fact that payment was made out of the firm assets, has been regarded as raising a presumption that it was intended to form a part of the partnership property. Such seems to be the conclusion of Judge Denio, as will be seen by the following quotation from an opinion written by him and approved by the other Judges of the New York Court of Appeals: “*Prima facie*, I should say that, where the land was taken in payment of a debt, it might be considered, in equity, as property of the same class as that which was parted with in making the purchase. So much of the undisputed property of the partnership has been exchanged for the land; it may possibly have been thus invested in order to pay a dividend to the several partners, to whom the land is conveyed; but the stronger probability would always be, in such a case, that it was taken as an expedient for collecting a debt. A conclusion which is to be adopted in the place of precise proof should always be in favor of the theory which is the most probable; and it is upon this rule that the burden of proof is most usually adjusted.”<sup>1</sup> But the weight of the authorities sustains the proposition that the mere fact that payment is made out of the partnership funds is not even *prima facie* proof of the conversion of real into personal estate. It must be shown, in addition to this fact, that the purchase was connected with the firm business, or was in pursuance of some agreement, express or implied, that it should be held for the benefit of the concern.<sup>2</sup>

§ 116. **Realty acquired outside of Partnership Business.**— Realty acquired by the partners as cotenants, prior to the formation of the partnership, as well as that acquired by them in common during the partnership, but independent of their partnership relations, and without the use of their partnership funds, may afterwards be appropriated to the use of the firm. The question then arises whether this appropriation impresses this real estate with the character of firm property.

<sup>1</sup> *Collumb v. Read*, 24 N. Y. 513.

<sup>2</sup> *Smith v. Jackson*, 2 Edw. Ch. 28; *Cox v. McBurney*, 2 Sandf. 561; *Wooldridge v. Wilkins*, 3 How. Miss. 360.



In one case, the answer has been made that it does not, because the resulting trust cannot arise in favor of the firm, without any writing, where the partnership has not contributed any portion of the purchase money.<sup>1</sup> But the question is, no doubt, one of intention merely. If the parties intended to bring this realty into their business, and thereby to *increase* their *partnership* assets, and their intent was consummated by an appropriation of the property to partnership purposes, then it should be regarded as a contribution to the stock in trade, and, as such, subjected to the law of copartnership. But this intention is not to be inferred from the mere fact that the property, even in pursuance of an agreement so to do, has been used by the firm, or for the firm purposes. There must be evidence sufficient to raise the presumption that they intended not only to *use* the property but also to contribute it to their joint capital in trade.<sup>2</sup> “There can be little doubt that the purchase of land by the partners, for the purposes of the partnership, and subject to an express or implied agreement that it shall be held for the benefit of the firm, will render it partnership property, even when the whole of the consideration is furnished by the partners individually, and no part of it comes from the assets of the partnership.”<sup>3</sup>

§ 117. **When Lands will be treated as Personalty.**—“If land, in addition to being paid for out of partnership funds, is brought into the partnership and used for partnership purposes, there is no doubt that it will, in equity, be treated as partnership stock, unless there is some agreement to the contrary or ‘the price is charged to the partners respectively in their several accounts with the firm.’”<sup>4</sup> “If in

<sup>1</sup> Deloney v. Hutcheson, 2 Band. 183.

<sup>2</sup> Frink v. Branch, 16 Conn. 261; Brooke v. Washington, 8 Gratt. 256; Thornton v. Dixon, 3 Bro. C. C. 199; Balmain v. Shore, 9 Ves. 500; Cookson v. Cookson, 8 Sim. 529; Ware v. Owens, 42 Ala. 215; Pecot v. Armelin, 21 La. An. 667.

<sup>3</sup> 1 White & Tudor's Lead. Cas. 241; Roberts v. McCarthy, 9 Ind. 16.

<sup>4</sup> Howard v. Priest, 5 Met. 582; Burnside v. Merrick, 4 Met. 537; Jarvis v. Brooks, 7 Foster, 67; Overholt's Appeal, 12 Pa. St. 222; Moderwell v. Mullison, 21 Pa. St. 259; Chaplin v. Tillinghast, 4 R. I. 173; Ludlow v. Cooper, 4 Ohio St. 1; Moreau v. Saffaran, 3 Sneed, 595; Lime Rock Bank v. Phettleplace, 8 R. I. 59; Robertson v. Baker, 11 Fla. 192; Buffum v. Buffum, 49 Me. 108; Mauck v. Mauck, 54 Ill. 281; Matlock v. James, 2 Beas. Ch. 126; Bryant v. Hunter, 6 Bush, 75; National Bank v. Sprague, 20

the conveyance the grantees should be described as tenants in common, it would be a circumstance bearing on the question of intent, though perhaps it might be considered a slight one; because those words would merely make them tenants in common of the legal estate, which, by operation of law, they would be without them."<sup>1</sup> "If the tenants in common are at the same time copartners, and the land was purchased with partnership funds, and for partnership purposes, it is deemed in equity converted into personal property, and is liable to be administered as such in winding up the affairs of the firm."<sup>2</sup> "Where real estate is purchased with partnership funds, for the use of the firm, and without any intention of withdrawing the funds from the firm for the use of all or any of the members thereof as individuals, I believe it has never been doubted in England that such real estate was, in equity, to be considered and treated as the property of the members of the firm collectively, and as liable to all the equitable rights of the partners as between themselves. And for this purpose the holders of the legal title are considered, in equity, as the mere trustees of those beneficially interested in the fund, not only during the existence of the copartnership, but also upon the dissolution thereof by the death of some of the copartners or otherwise."<sup>3</sup> The same principles of equity which direct the administration of real estate, the legal title of which is held by the members of the firm as tenants in common, operate with like force and effect when this legal title is held by one partner only, or even by a third person, if it be held for the use and benefit of the firm jointly.<sup>4</sup>

N. J. Eq. 13; *Willis v. Freeman*, 35 Vt. 44; *Lang v. Waring*, 25 Ala. 625; *Duhring v. Duhring*, 20 Mo. 174; *Davis v. Christian*, 15 Gratt. 11; *Holland v. Fuller*, 13 Ind. 195; *Phillips v. Phillips*, 1 Mylne & K. 649; *Broom v. Broom*, 3 Mylne & K. 443; *Moran v. Palmer*, 13 Mich. 367; *Fowler v. Bailey*, 14 Wis. 125; *Cilley v. Huse*, 40 N. H. 358; *Arnold v. Wainwright*, 6 Minn. 358.

<sup>1</sup> *Dyer v. Clark*, 5 Met. 562; *Matlock v. Matlock*, 5 Ind. 403; *Abbott's Appeal*, 50 Pa. St. 238.

<sup>2</sup> *Collumb v. Read*, 24 N. Y. 509; *Meily v. Wood*, 71 Pa. St. 488.

<sup>3</sup> *Chancellor Walworth*, in *Buchan v. Sumner*, 2 Barb. Ch. 199.

<sup>4</sup> *Nicoll v. Ogden*, 29 Ill. 328; *Uhler v. Semple*, 20 N. J. Eq. 288; *Jarvis v. Brooks*, 7 Fost. 37; *Pugh v. Currie*, 5 Ala. 446; *Deveney v. Mahoney*, 8 C. E. Green, 247; 12 Am. L. Reg. 68.

§ 118. **For what purposes Realty treated as Personalty.**—Whether the conversion of partnership realty into personalty prevails for all purposes or for some only is a question which Judge Story “considered as open to many distressing doubts.”<sup>1</sup> The doubts are no less distressing now than when they first perplexed the learned Judge, but, by considering the number of the adjudications, in the two countries, it will be readily ascertained where the weight of the authorities in both England and America rests; and the results thus ascertained in regard to the two countries, will be found to be in irreconcilable conflict with each other. The earlier English decisions were in favor of the proposition that the conversion of realty into personalty extended no further than was necessary to an equitable adjustment of the claims of the firm creditors, and of the rights of the members of the firm between themselves. Subject only to those claims and rights, the real property continued to be distinguished by its ordinary legal incidents, and liable to disposition according to the rules of law. It therefore passed to the heirs or devisees.<sup>2</sup> But this construction of the law of copartnership is now certainly overthrown in England.<sup>3</sup> After fully considering the decisions then existing, the Vice-Chancellor, in a leading case on this subject, thus summed up his own reasons and the result to which those reasons, as well as the prior adjudications, led him: “I should, therefore, feel no hesitation in coming to this conclusion, that the mere contract of partnership, without any express stipulation, involves in it an implied contract, quite as stringent as if it were expressed, that, at the dissolution of the partnership, all the property then belonging to the partnership, whether it be ordinary stock in trade, or a leasehold interest, or a fee-simple estate in land, shall be sold, and the net proceeds, after satisfying all partnership

<sup>1</sup> Story on Partnership, sec. 98.

<sup>2</sup> Thornton v. Dixon, 8 Bro. Ch. B. 199; Bell v. Phyn, 7 Ves. 453; Balmain v. Shore, 9 Ves. 501; Cookson v. Cookson, 8 Sim. 529.

<sup>3</sup> Essex v. Essex, 20 Beav. 442; Ripley v. Waterworth, 7 Ves. 425; Houghton v. Houghton, 11 Sim. 491; Broom v. Broom, 3 Mylne & K. 443; Phillips v. Phillips, 1 Mylne & K. 649; Fereday v. Wightwick, 1 Russ. & M. 45; Crawshay v. Maule, 1 Swanst. 495; Kirkpatrick v. Sim, 5 Pat. Scotch App. 525; Selkrig v. Davies, 2 Dow, 230; Townshend v. Devaynes, 1 Mont. Partn. note 2 A, Appx. 96; Morris v. Kearsley, 2 Young & C. Ex. 139; Holroyd v. Holroyd, 7 W. R. 426.

debts and liabilities, be divided among the partners; and that each partner, and the representatives of any deceased partner, have a right to insist on this being done."

"Now, if it be established that, by the contract of partnership, all the partnership property is to be sold at the dissolution of the partnership, then any real property which has become the property of the partnership, becomes, by force of the partnership contract, converted into personalty; and that, not merely as between the partners to the extent of discharging the partnership debts, but as between the real and personal representatives of any deceased partner."<sup>1</sup> There are some American cases in full accord with the rule as stated in the latest English cases. Thus, the Chief Justice of the Court of Appeals of the State of Kentucky, in a very recent decision, in which his associates concurred, asserted that "upon a review of the authorities, the analogies, and reasons of the law, we conclude that a safe and reliable rule may be deduced as to that class of property to which this evidently belongs; that is, when property is bought with partnership funds, to be used in carrying on and facilitating the partnership business, and operations and profits, it is then partnership property, impressed with the characteristic of personalty for any and all purposes, not only as between the partners *inter se* and the firm and its creditors, but also as to distribution between the administrator, distributees, and heirs."<sup>2</sup> But the American decisions, by a preponderance that approaches unanimity, are in direct conflict with the rule thus announced by the Court of Appeals of Kentucky. The American theory is that the legal title of the partnership realty is held by the copartners as tenants in common, subject in equity to be applied to the payment of the debts of the firm; that when such debts are paid, all "the incidents and qualities of real estate revive;" that the trust in favor of the partnership existed only in behalf of partnership objects and liabilities, and these being fully discharged, the legal title is

<sup>1</sup> *Darby v. Darby*, 3 *Drewry*, 505.

<sup>2</sup> *Cornwall v. Cornwall*, 6 *Bush*, 372; approved in *Bank of Louisville v. Hall*, 8 *Bush*, 678. These two cases, and *Pierce v. Trigg*, 10 *Leigh*, 406, are probably the only American cases in favor of the theory of the absolute conversion of realty into personalty for *all* purposes.

released from all trusts, and will descend to the heir as in the case of any other tenancy in common.<sup>1</sup> In a very recent decision denying the application of an administrator, made to a court of equity, asking that certain realty might be converted into personalty, the American rule, and the reasons on which it rests, were stated by the Court as follows:

“Neither the ground of interposition nor the mode of its exercise is changed by the decease of the party in whose behalf it is required. His representatives are substituted in his place. Their rights are derivative merely. Equities between them, if any there be, are subordinate and posterior to those which spring from the relation of copartnership. The conversion of real estate into personalty is worked, if at all, for the purpose of adjusting the affairs of the partnership. It would seem, therefore, that the conversion should be made only when and so far as required for that purpose; and that the effect upon the descent or distribution of the share of a deceased partner among his representatives should be regarded as incidental merely, and not an end for which the interference of a court of equity is to be sought.

“In view of the grounds and purposes of such equitable conversion, even regarding all the partnership real estate, however the legal title may be held, as held in trust for the partnership, this Court are disposed to hold, notwithstanding the great weight of authority to the contrary elsewhere, that such real estate is to be converted into personalty only when such conversion is required for the payment of claims against the partnership which are in the nature of debt. Balances due to individual partners, for advances to the firm, or for payments made in its behalf, come within this definition.<sup>2</sup> So also may capital furnished by one partner, when by the terms upon which it was furnished, or from the nature and necessity of the case, it is to be repaid in specific amounts, in order to reach the net result, or the body of the partnership interests,

<sup>1</sup> *Piper v. Smith*, 1 Head, 93; *McAllister v. Montgomery*, 3 Hayw. 94; *Yeatman v. Wood*, 6 Yerg. 21; *Scruggs v. Blair*, 44 Miss. 406; *Goodburn v. Stevens*, 5 Gill, 1; *Rice v. Barnard*, 20 Vt. 479; *Holland v. Fuller*, 13 Ind. 195; *Tillinghast v. Chaplin*, 4 R. I. 173; *Sumner v. Hampson*, 8 Ohio, 358; *Hanff v. Howard*, 8 Jones Eq. 440; *Collins v. Warren*, 29 Miss. 286; *Lang's Heirs v. Waring*, 25 Ala. 625; *Piatt v. Oliver*, 3 McL. 27; *Wilcox v. Wilcox*, 13 Allen, 252.

<sup>2</sup> See also *Gray v. Palmer*, 9 Cal. 689.

to which the proportional rights or shares of the several partners attach. In short, whatever is required to be paid or measured in precise sums must be so adjusted; and real estate, converted for that purpose, undoubtedly becomes personality, and is entitled to be distributed as such when paid over to the party entitled. But the shares in the body of the partnership, those interests which are not measured by precise amounts, but consist in a common proprietorship after all special claims are satisfied, stand on a different footing. These interests are determined by the proportions fixed by the articles or organic law of the partnership. When the beneficial interests and the legal title correspond, it has already been decided that the rights of the partners in real estate so held will be left to adjust themselves by descent of the legal title with its incidents, as real estate of the several partners, held in common. When the legal title is otherwise held, it is held in trust; and the equitable title descends in like manner and with like incidents, except as to dower. The office of equity is merely to declare trusts, and compel the legal title to serve the equitable interests. This is accomplished by directing such conveyances as will make the legal title of the several parties conform to their respective beneficial interests.

“By the rule above indicated, all partnership rights and obligations are secured, and all equities growing out of that relation are met and answered. To require equitable interference to go further, and convert all real estate into personality, for the mere purpose of a division, seems to us to be an unnecessary invasion of the rights of the copartners, and, when undertaken in the interest of one class of the representatives of a deceased partner, against another class of representatives of the same partner, it seems to be a departure from the legitimate sphere of equitable jurisdiction. It is not the province of equity to seek to counteract or modify the operation of the laws of descent and distribution.”<sup>1</sup>

§ 119. **Conveyance by Partner.**—At law, as we have seen, the partners are tenants in common of their realty. Each

<sup>1</sup> *Shearer v. Shearer*, 98 Mass. 111.

can therefore convey his undivided interest, and neither can convey any part of the interest of his copartners.<sup>1</sup> And during the continuance of the copartnership, the rule is, in equity, the same as at law. No matter how absolute the conversion of the realty into personalty may be, "each partner is required, both at law and in equity, to join in every conveyance of real estate in order to pass the entirety thereof to the grantee; and if one partner only executes it, whether it be in his own name or in that of the firm, the deed will not ordinarily convey any more than his own share or interest therein."<sup>2</sup> But upon the decease of any of the members of a firm, the survivors are invested with a power which they did not before possess. The realty of the late firm is so far converted into personalty, in equity, as to be subject, like choses in action or any other personal assets, to be sold by the survivors, if such sale is necessary to pay the partnership debts. A deed executed by the survivors, in pursuance of such sale, does not convey the legal title of the deceased copartner, for that is vested in his heir by operation of the law of descents; but it does convey the entire equitable title, and the purchaser "may call on the heir for the legal title, and compel him to convey."<sup>3</sup>

§ 120. **The conveyance of his undivided interest which either partner may make during the continuance of the partnership is, if made to a purchaser with actual or constructive notice, subject to the trusts then existing against the realty conveyed and in favor of the partners and the creditors of the firm. In this, as in all other cases, a vendee, with notice, obtains no rights superior to those held by the vendor.<sup>4</sup> And, on the other hand, there seems to be no doubt that a vendee or mortgagee of a partner will obtain both the legal and the**

<sup>1</sup> *Jackson v. Stanford*, 19 Geo. 15; *Anderson v. Tompkins*, 1 Brock. 463; *Whitman v. B. & M. R. R.*, 8 Allen, 133; *Turbeville v. Ryan*, 1 Humph. 113.

<sup>2</sup> *Story on Partnership*, sec. 94; *Davis v. Christian*, 15 Gratt. 36. The deed by one partner of firm realty, in discharge of a firm debt, transfers both the legal and the equitable title to such partner's moiety. *Van Brunt v. Applegate*, 44 N. Y. 544.

<sup>3</sup> *Andrew's Heirs v. Brown's Admrs.* 21 Ala. 443; *Delmonico v. Guillaume*, 2 Sandf. Ch. 366; *Broom v. Broom*, 3 Mylne & K. 443; *Dupuy v. Leavenworth*, 17 Cal. 268.

<sup>4</sup> *Kistner v. Sindlinger*, 33 Ind. 117; *Edgar v. Donnelly*, 2 Munf. 387; *Hoxie v. Carr*, 1 Sumn. 174.



equitable title to the moiety purchased by him, and will hold the same free from all trusts of which he had no notice, actual or constructive, at the date of his purchase; and further, that the fact of which he must have notice, is not merely that his vendor was a partner as well as a cotenant, but that, on account of such partnership, the realty was in equity liable to certain liabilities then existing.<sup>1</sup> But notice will be "implied whenever the circumstances are such as to justify the presumption that the purchaser either knew or remained wilfully ignorant."<sup>2</sup> As between the partners and creditors of one of the partners, it cannot be shown, according to the decisions in Pennsylvania, that a deed which is apparently made to the partners as tenants in common, was in fact a conveyance to them to hold as partnership assets. "Partners who take a deed in their individual right as tenants in common, stand in a different relation to the public" from that in which they stand towards each other. "Their acts tend to mislead both purchasers and creditors trusting to the apparent state of the title. Partners being the owners of the money which pays for the title, have the power of directing its application to suit their own purposes, and can, if they choose, always secure the identity of its character in the kind of title they take for it. If, therefore, they take title to themselves as tenants in common, instead of as partners, they, by their own election, stamp the character of the title taken as to those who afterwards deal with them. \* \* \*

It is contended by the appellant that a creditor is not within the recording acts, and not entitled to notice of the true character of the title. It is true that the recording acts extend only to purchasers and mortgagees, and their effect is to defeat an unrecorded deed as to subsequent purchasers and mortgagees without notice of it, while a creditor is not protected against the unrecorded deed, but must stand on the title as it was in fact when his lien attached. This is very different, however, from the use of parol evidence to alter the effect of a deed which itself displays the title. To alter a

<sup>1</sup> *Buchan v. Sumner*, 2 Barb. Ch. 198; *Frink v. Branch*, 16 Conn. 270; *Forde v. Heron*, 4 Munf. 316; *McDermot v. Lawrence*, 7 Searg. & R. 441; *Haile v. Henrie*, 2 Watts, 143; *Hale v. Plummer*, 6 Ind. 121; *Abbott's Appeal*, 50 Pa. St. 238.

<sup>2</sup> 1 Lead. Cas. in Eq. 241; *Tillinghaet v. Champlin*, 4 R. I. 173.



deed so as to make it of different import, offends against the spirit of all those laws made to protect the public against fraud and secret titles, and prevent a change of right to the prejudice of those who deal upon the apparent legal operation of the instrument. \* \* \* It is very clear that honest creditors who are led to give credit to the individual partners on the apparent state of the title in them individually, ought not to be met afterwards by a change of the face in the deed by which it takes a partnership aspect contrary to its terms."<sup>1</sup> In this case, the contest was between a creditor of one of the partners and another partner, the latter claiming that the real estate should be held as partnership assets, and its proceeds applied to the payment of a sum found to be due to him from the firm. If, however, the contest had arisen between the creditors of one partner and the creditors of the firm, the decision would have been the same, for the Courts of this State seem to have uniformly decided that parol evidence is not admissible to show that lands apparently held by a tenancy in common are in fact held in partnership, and therefore pledged to partnership creditors;<sup>2</sup> but for the purpose of establishing the rights of the *partners* in a litigation between them, such evidence is admissible.<sup>3</sup>

But in a very recent English decision, it has been determined that the possession of lands for partnership purposes by the cotenants thereof, is such a notice to third persons that it may be *partnership assets*, as to place them upon inquiry in reference to the true nature of the title, and that either partner may insist upon the partnership character of the realty as against *all* persons dealing with his copartner and having notice of the use made of the lands for partnership purposes.<sup>4</sup>

<sup>1</sup> Ebbert's Appeal, 70 Pa. St. 81; Abbott's Appeal, 50 Pa. St. 238.

<sup>2</sup> Lefevre's Appeal, 69 Pa. St. 125; Hale v. Henrie, 2 Watts, 144; Ridgway, Budd & Co.'s Appeal, 15 Pa. St. 181; Erwin's Appeal, 39 Pa. St. 537; Overholt's Appeal, 12 Pa. St. 222; Cumming's Appeal, 25 Pa. St. 269.

<sup>3</sup> Abbott's Appeal, 50 Pa. St. 238.

<sup>4</sup> Cavander v. Bultul, 29 L. T. R. (N. S.) 710.

## **CHAPTER VII.**

### **COMMUNITY PROPERTY.**

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**Conveyance to Wife, rebutting presumption as to, in California, § 147.**

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§ 121. By the common law, no co-ownership resulted from the marriage relation. It is true that the wife, after the decease of her husband, was "endowed of a third part of such lands and tenements as were her husband's at any time during the coverture; to have and to hold to the same wife in severalty, *by metes and bounds*, for term of her life."<sup>1</sup> But this right of dower never created any undivided interest in the lands of the husband. He held the freehold in severalty. "Upon the death of the husband, the right to dower, which the wife acquired by marriage, becomes consummate; but unless the precise portion of land which she is to have is particularly specified, as was formerly sometimes done, she cannot enter till dower is assigned to her; for she might, in that case, choose whatever part of the lands she pleased, which would be injurious to the heir. The widow has therefore *no estate* in the lands of her husband *till assignment*; for the law casts the freehold on the heir, immediately upon the death of the ancestor."<sup>2</sup> Tenancy by entireties, it is true, existed at the common law, and was an estate dependent upon the marriage relation for its creation and continuance. But it was not created solely by such relation. It was generally produced by a gift to the husband and wife, or by a purchase made by him, the conveyance for which, by his direction, was taken in the name of both himself and his wife. It did not arise as the inevitable consequence of the marriage relation, nor was it designed or calculated as a means of assuring to each spouse his or her just share of the assets or gains of the matrimonial copartnership. It existed but rarely, and depended for its creation on the generosity of relatives seeking to make some provision for the wife, or on the generosity of the husband, pursuing a like object. The co-ownership of which we are about to treat, like tenancy by entireties, existed in connection with the marital relation, but instead of being a rare and accidental incident, it was, in the absence of stipulations to the contrary, the unavoidable result of that relation. Instead of representing the generosity of husband or relatives, it was a just recognition of the services of the wife, and of her care and fidelity as one of the marital co-

<sup>1</sup> Litt. sec. 36; 1 Greenl. Cruise, 153.

<sup>2</sup> 1 Greenl. Cruise, 168.

partners, and it secured to her as a matter of right not a mere life estate in one-third of her husband's lands, but an estate in fee-simple equal to his in quantity, and including *all* the matrimonial acquisitions, whether real or personal.

§ 122. In the civil law, the interests of the husband and wife were more distinct than at common law. The civil law "does not recognize in the husband and wife that union of persons by which the rights of the wife were incorporated and consolidated, during the coverture, with those of the husband. It does not, therefore, subject her to those civil disabilities which must have resulted from that union. The husband and wife are regarded as distinct persons, with separate rights, and capable of holding distinct and separate estates."<sup>1</sup> The community of goods between husband and wife, which has been adopted in different forms in many systems of jurisprudence, if it was ever a part of the Roman law, fell into disuse before the compilation of the Digest, and existed only where the parties adopted it by their nuptial agreement.<sup>1</sup> At their marriage, the wife brought her *dos*, and the husband his *donatio propter nuptias*, or *antidos*. As to all their other property, each retained and exercised the rights of owners in severalty. The wife's property not subject to the *dos* was called *bona extra dotem*. The *dos*, or dotal property, was that contributed at the marriage by or on behalf of the wife. The husband exercised dominion over it during the coverture, received the rents, fruits, and profits thereof; and could alienate such part as was personal, and that only. The interest and authority of the husband over the dotal property ceased at the dissolution of the marriage, and the property, with its accessions, reverted to the wife or some of her relatives, except as to the parts he had lawfully sold, and for these parts he was accountable for the prices realized. The *donatio propter nuptias* was the gift of property required by the civil law to be made on behalf of the husband *ad sustinenda onera matrimonii*. It seems to have been treated as a mere security for the wife's *dos*. The husband was entitled to all profits derived from it during coverture, and to its res-

<sup>1</sup> Burge Colonial Law, 263.

toration on the dissolution of the marriage. The property of the wife which was *extra dotem* consisted of *paraphernalia* and *receptitia*. The former included the property brought by her into the house, or of which the husband had possession, and of which inventory was taken; the latter term indicated the property of which she retained possession wholly separate from her husband.<sup>1</sup>

§ 123. **Community in America.**—The States of Louisiana, Texas, California, and Nevada, and the Territories of Arizona, Idaho, and New Mexico, instead of adopting the provisions of either the civil or the common law in regard to the property relations of husband and wife, have made them co-owners or copartners in interest, by creating a community of property between them very similar to that existing under the laws of France and Spain. In the three States first named, this system had been in force, and large and valuable interests had become vested under it, before their attachment to the United States, and before they had become, to any considerable extent, inhabited by people accustomed to the common law. The Province of Lower Canada, owing, no doubt, to the partiality of its citizens of French birth or ancestry to the laws and institutions of their fatherland, has recently adopted a Civil Code containing the chief features of the Code Napoleon, including the law creating, defining, and regulating the community of assets between husband and wife. In the State of Missouri, and probably in other parts of the territory ceded to the United States by France, the French Law, though not now in force, has been, to some considerable extent, the subject of judicial investigation, in connection with claims to real estate the title to which had been acquired while the country and its inhabitants were yet under the dominion of France. It would be as foreign to the object of this work to undertake an exposition in detail of the whole of the law respecting community, as to undertake a like detail of the common law regulating the rights and relations of husband and wife. But as the community is a species of co-ownership,<sup>2</sup>

<sup>1</sup> Burge Colonial Law, 273.

<sup>2</sup> "The husband and wife, during coverture, are jointly seized of the property, with a half interest remaining over to the wife, subject only to the husband's disposal dur-

we shall consider it, so far at least as to show of what it is generally composed, and to present some of the chief tests by which to distinguish it from other property owned by either of the spouses in severalty.

§ 124. A community is either legal or conventional: *legal* when established by force of the law, independent of any marriage contract;<sup>1</sup> and *conventional* when modified by some agreement of the parties which the law authorized them to make.<sup>2</sup> The community, whether legal or conventional, commences, according to the French law, from the day of contracting the marriage before the officer of the civil power; and cannot, even by stipulation, begin at any other time.<sup>3</sup>

§ 125. The modifications of the legal community by which such community becomes conventional instead of legal, may embrace every description of agreement except: 1st. Those contrary to good morals; 2d. Those derogating from the rights resulting from the power of the husband over the persons of his wife and children, or from the rights conferred on the surviving husband or wife by the "Title of Paternal Power," and by the "Title of Minority, Guardianship, and Emancipation;" 3d. Those changing the legal order of succession.<sup>4</sup> The principal modifications are:

1st. By way of realization; viz., that the present or future moveables shall be excluded from the community, in whole or in part.

ing their joint lives. This is a present, definite, and certain interest." (*Beard v. Knox*, 5 Cal. 256.) Affirmed in *De Godey v. Godey*, 39 Cal. 164, where the Court, in speaking of the interest of the wife in the common property, said: "The theory upon which the right of the wife is founded is, that the common property was acquired by the joint efforts of husband and wife, and should be divided between them if the marriage tie is dissolved either by the death of the husband or by a decree of the Court. Her mere right in the community property is as well defined and ascertained in contemplation of law, even during the marriage, as is that of the husband." Speaking of husband and wife, the Supreme Court of Texas said: "Their rights of property in the effects of the community are perfectly equivalent to each other." (*Wright v. Hays*, 10 Tex. 133.) The estate vested in husband and wife by virtue of the law of community, is such a vested right that the Legislature has no power to divest it by any law. (*Portis v. Parker*, 22 Tex. 702.)

<sup>1</sup> Civil Code of Lower Canada, secs. 1268 and 1270.

<sup>2</sup> Civil Code of Lower Canada, sec. 1384.

<sup>3</sup> Code Napoleon, sec. 1399; Civil Code Lower Canada, sec. 1269.

<sup>4</sup> Code Napoleon, secs. 1497 and 1387 to 1390. See also Art. 4632 Paschal's Tex. Dig.

2d. By way of mobilization, that the whole or some part of the immoveables shall be included in the community.

3d. That each of the parties shall pay his or her antenuptial debts.

4th. That in case of renunciation by the wife, she may resume her contributions, free and unincumbered.

5th. That the survivor shall have a *preciput* or reversion.

6th. That the spouses shall have unequal shares.

7th. That there shall be between them community by general title; or, in other words, a universal community.<sup>1</sup>

To these the Code Napoleon prefixes the further modification that the community shall only embrace purchases.<sup>2</sup> As in treating of the subject of cotenancy under the common law, we shall devote no space to the consideration of modifications of the law effected by agreements entered into by the parties, we shall not now depart from our plan so far as to give any further attention to conventional or modified community, but shall appropriate the remainder of this chapter to the legal or unmodified community.

§ 126. The legal community in some countries extended to all the property belonging to the parties at or subsequent to the marriage; in others, it embraced only the moveables of the parties at the time of their marriage, and certain acquisitions made afterwards. Thus, according to the law of Holland, the *communio bonorum*, or legal community, was either universal or particular. The universal included all the property of both husband and wife before or at their marriage, and also that which they acquired during coverture. "The *communio particularis* comprises only the property which is acquired by them during the coverture. It is called *communio quæstum*."<sup>3</sup> In delivering the opinion of the Supreme Court of Missouri, Judge Scott, referring to rights of property created while that State was a Spanish province, said: "By the Spanish law, which prevailed here at the time of this marriage, by mere operation of law, without any stipulation or agreement, a community or partnership was estab-

<sup>1</sup> Code Lower Canada, sec. 1384.

<sup>2</sup> Code Napoleon, sec. 1497.

<sup>3</sup> Burge Col. & For. Laws, 277.

lished between husband and wife of all their estate, both real and personal.”<sup>1</sup> If this statement be correct, then the law in force in Missouri must, in this respect, have established between the spouses rights similar to that of the universal community in force in Holland. But the position of Judge Scott, unless based upon some special law or custom of the Province, does not seem to be tenable. According to Mr. Burge: “The law of Spain does not recognize the general *communio bonorum* which prevailed in Holland, but admits only the *communio quæstum*. The latter is constituted between the husband and wife as the legal and necessary effect of the marriage. The property of which it consists is termed *ganancial*, *Bienes gananciales*.”<sup>2</sup> According to the above quotation, and to other reliable authorities, the community, according to the laws of Spain, excluded all property owned by the spouses prior to their marriage.<sup>3</sup> Nor did it embrace everything acquired during the existence of the marital relations; but only those acquisitions “which were attained by the industry, the labor, or the negotiation of one or both the parties; those, in fact, which arose *ex questu*, or by onerous title, and not those by lucrative title, such as legacy, inheritance, or donation, made separately to one of the partners in matrimony. These last acquisitions are not the fruit of the joint or several labor or diligence of the parties, but arise from the personal merits of the donee.”<sup>3</sup>

§ 127. The French community embraced more than that of Spain, but less than that of Holland. It consisted:

1st. “Of all the moveable property which the married parties possessed at the day of the celebration of the marriage, together with all the moveable property which falls to them during the marriage by title of succession, or even of donation, if the donor have not expressed himself to the contrary.

2d. “Of all the fruits, revenues, interests, and arrears, of what nature soever they may be, fallen due or received during the marriage, and arising from property which belonged to

<sup>1</sup> *Childress v. Cutter*, 16 Mo. 41.

<sup>2</sup> 1 Burge Col. & For. Laws, 418.

<sup>3</sup> Schmidt's Civil Law Spain and Mexico, 12; *Wilkinson v. Wilkinson*, 20 Tex. 242.



the married persons at the time of the celebration, or from such as has fallen to them during the marriage, by any title whatsoever.

3d. "Of all the immoveables which are acquired during marriage."<sup>1</sup>

§ 128. In California, all property owned by either husband or wife before marriage, and that "acquired afterwards, by gift, bequest, devise, or descent, with the rents, issues, and profits thereof," is separate property;<sup>2</sup> and "all other property acquired after marriage by either husband or wife, or both, is community property."<sup>3</sup> "Community property is property acquired by husband and wife, or either, during marriage, when not acquired as the separate property of either."<sup>4</sup> "The earnings and accumulations of the wife, and of her minor children living with her or in her custody, while she is living separate from her husband, are the separate property of the wife."<sup>5</sup>

§ 129. The laws of Arizona, Idaho, and Nevada,<sup>6</sup>

<sup>1</sup> Code Napoleon, sec. 1401; Civil Code, Lower Canada, sec. 1272.

<sup>2</sup> Civil Code, secs. 162-3. <sup>3</sup> Ibid, sec. 164. <sup>4</sup> Ibid, sec. 687. <sup>5</sup> Ibid, sec. 169.

<sup>6</sup> "All property, both real and personal, of the wife, owned by her before her marriage, and that acquired afterwards by gift, bequest, devise, or descent, shall be her separate property; and all property, both real and personal, owned by the husband before marriage, and that acquired by him afterwards by gift, bequest, devise, or descent, shall be his separate property.

"All property acquired after the marriage, by either husband or wife, except such property as may be acquired by gift, bequest, devise, or descent, shall be common property." (Comp. Laws of Arizona, ed. of 1871, p. 306, secs. 1 and 2; Laws of Idaho, Session 1866-7, p. 65, secs. 1 and 2.) Secs. 1 and 2 of the Act of the Legislature of Nevada, defining the rights of husband and wife, are as follows:

SEC. 1. "All property of the wife, owned by her before marriage, and that acquired by her afterwards by gift, bequest, devise, or descent, with the rents, issues, and profits thereof, is her separate property; and all property of the husband, owned by him before marriage, and that acquired by him afterwards by gift, bequest, devise, or descent, with the rents, issues, and profits thereof, is his separate property.

SEC. 2. "All other property acquired after marriage, by either husband or wife, or both, except as provided in sections fourteen and fifteen of this act, is community property." (Comp. Laws, Nev., p. 56, secs. 151-2.) Sections fourteen and fifteen of the same act are as follows:

SEC. 14. "The earnings and accumulations of the wife, and of her minor children living with her or in her custody, while she is living separate from her husband, are the separate property of the wife.

SEC. 15. "When the husband has allowed the wife to appropriate to her own use her earnings, the same, with the issues and profits thereof, is deemed a gift from him to her, and is, with such issues and profits, her separate property." (Ib. p. 58, secs. 164-5.)

establishing the property relations of the spouses, are in several respects identical, both in form and substance, with the provisions of the Civil Code of California, quoted in the preceding section.

§ 130. In Louisiana, by section 2371 of the Civil Code, the "partnership or community consists of the profits of all the effects of which the husband has the administration and enjoyment, either of right or in fact, of the produce of the reciprocal industry and labor of both husband and wife, and of the estates which they may acquire during the marriage, either by donation made jointly to them both, or by purchase, or in any other similar way, even although the purchase be only in the name of one of the two and not of both, because in that case the period of time when the purchase is made is alone attended to, and not the person who made the purchase."

§ 131. In Texas, "All the effects which both husband and wife reciprocally possess at the time the marriage may be dissolved, shall be regarded as common effects or gains, unless the contrary be satisfactorily proved."<sup>1</sup> "All property, both real and personal, of the husband, owned or claimed by him before marriage, and that acquired afterwards by gift, devise, or descent, as also the increase of lands or slaves thus acquired, shall be his separate property. All property, both real and personal, of the wife, owned or claimed by her before marriage, and that acquired by gift, devise, or descent, as also the increase of all lands thus acquired, shall be the separate property of the wife."<sup>2</sup> "All property acquired by either husband or wife during the marriage, except that which is acquired in the manner specified in the preceding section, is common property."<sup>3</sup>

§ 132. The domicil of the husband and wife, at the period of their marriage, may be considered as affecting the question whether property acquired in or removed to some other State than that in which the marriage was celebrated, is to be governed by the law of the matrimonial or of the

<sup>1</sup> Paschal's Tex. Dig. Art. 4638.

<sup>2</sup> Ib. Art. 4641.

<sup>3</sup> Ib. Art. 4642.

actual domicil. Foreign jurists have never been able to agree as to whether the rights of the spouses are controlled by the law of the matrimonial domicil, or are subject to the laws of the State or nation in which the spouses may, from time to time, choose to take up their residence.<sup>1</sup> The American adjudications on this subject are nearly all embraced in the decisions of the Courts of the State of Louisiana. By these decisions, the rights of spouses migrating to that State are governed, as to all subsequent acquisitions, by the laws of Louisiana,<sup>2</sup> and as to all prior acquisitions by the law of the country in which such acquisitions were realized.<sup>3</sup> Parties marrying with the intention of removing to another State, are supposed to have designed that their marital rights should be subject to the laws of such State. Therefore, persons who at their marriage intend going to Louisiana to reside, are there treated as subject to the law of community.<sup>4</sup> The domicil of the husband is also the domicil of the wife. If he take up his domicil in a State, she thereby acquires a domicil in the same State.<sup>4</sup> The fact that the wife lives in another State, does not divest her of her interest in the community.<sup>5</sup> The general tendency of the American decisions, and the expressed preferences of American jurists, are in favor of declaring "the law of community to be a real law, and not a personal law," and therefore that "it ought to regulate all things which are situate within the limits of the country wherein it is in force, but not elsewhere."<sup>6</sup> "Hence, if persons, who are

<sup>1</sup> Story Conf. Laws, secs. 166-176; Wharton Conf. Laws, 193-8.

<sup>2</sup> *Saul v. His Creditors*, 7 Mart. 593; *Gale v. Davis*, 4 Mart. 645; *Le Breton v. Nouchet*, 3 Mart. 60. In Lower Canada, the rule is different. If parties married where the law of community did not prevail, afterwards acquire a domicil in Lower Canada, their subsequent acquisitions are not subject to the law of community—(*Rogers v. Rogers*, 3 Lower Canada Jur. 64)—and if married in Lower Canada, they are treated as still subject to the law of community, though they have acquired a domicil elsewhere. (*Laviolette v. Martin*, 11 L. C. R. 254.) But where parties domiciled in Lower Canada were married elsewhere, it will be presumed, in the absence of proof to the contrary, that the matrimonial rights of the parties at the place of their marriage were the same as the rights of parties married in Lower Canada. (*Brodie v. Cowan*, L. C. Jur. 96.)

<sup>3</sup> *Allen v. Allen*, 6 Rob. La. 104; *Bouth v. Her Husband*, 9 Ib. 224; *Ford v. Ford*, 2 Mart. N. S. 574; *Fisher v. Fisher*, 2 La. An. 774; *Walker v. Durerger*, 4 Ib. 569. The same rule is applied in Texas. *The State v. Barrow*, 14 Tex. 179.

<sup>4</sup> *Kashaw v. Kashaw*, 3 Cal. 322.

<sup>5</sup> *McKenna's Succession*, 23 La. An. 369; *Moore v. Thibodeaux*, 4 La. An. 74.

<sup>6</sup> Story's Conf. Laws, sec. 174; *Succession of Melissa Robinson*, 23 La. An. 174.

married in Louisiana, where the law of community exists, own immoveable property in Massachusetts, where such community is unknown, upon the death of the husband, the wife would take her dower only in the immoveable property of her husband, and the husband, upon the death of the wife, would take, as tenant by curtesy, only in the immoveable property of his wife.”<sup>1</sup>

§ 133. Lands given by the sovereign to either of the spouses, during coverture, formed, according to the laws of Spain, the separate property of the one in whose name the gift was made, except when the gift was in consideration of military services rendered by the husband, without pay, and while he was supported out of community assets.<sup>2</sup> This law has been held to be applicable to a donation made by the United States government to a citizen of Louisiana, while the laws of Spain were still in force in that State.<sup>3</sup> The chief test for determining whether property acquired by either husband or wife during the marriage was community assets, under the laws of Spain, was to ascertain whether it was acquired by *onerous* title. If so acquired, it belonged to the community. “An onerous title is defined to be that by which we acquire anything, paying its value in money, or in any other thing, or in services, or by means of certain charges and conditions to which we are subjected.”<sup>4</sup> The grants of land made to married men in Texas, under the colonization law of 1823, and also lands acquired by husbands, as heads of families, under the act of January 4, 1839, have been treated in that State as acquisitions by onerous title, and as being, on that account, exempt from the general rule that grants from the sovereign are the separate estate of the grantee.<sup>5</sup> The decisions in Texas are based upon the theory that as the gift from the government was made upon certain conditions with which compliance was necessary, and as certain fees were

<sup>1</sup> Story's Conf. Laws, sec. 454.

<sup>2</sup> Wilkinson v. Am. Iron Mountain Co. 20 Mo. 128; Frique v. Hopkins, 4 Mart. N. S. 212; Rouquier v. Rouquier, 5 Mart. N. S. 98; Gayosa v. Garcia, 1 Mart. N. S. 334.

<sup>3</sup> Hughey v. Barrow, 4 La. An. 250.

<sup>4</sup> Yates v. Houston, 3 Tex. 453; Noé v. Card, 14 Cal. 596.

<sup>5</sup> Wilkinson v. Wilkinson, 20 Tex. 242; Yates v. Houston, 3 Tex. 453.

required to be paid to certain officers of the government, the acquisitions were by onerous and not by lucrative title. The judicial tribunals of California dissent from those of Texas upon this subject. A Justice of the Peace, under the Mexican government, granted a lot in the present city of San Francisco to one Noé, subject to the conditions that, within one year, the lot should be fenced and have a house built thereon, and certain municipal fees established by law paid. In regard to these conditions, the Court, by Chief Justice Field, said: "At the civil law, as at the common law, donations may be accompanied with conditions, the performance of which may be required for the possession or enjoyment of the property donated. When the donation is solicited for specific purposes, it may be accompanied with conditions limiting the property to such purposes without changing the character of the act, even when the conditions impose the discharge of expensive and burdensome duties. Thus, if one should solicit a gift of land in order that he might construct a church or college thereon, and the land should be granted on condition that such church or college should be erected, the gift would be none the less a donation for the presence of the condition. \* \* \* The premises were not, therefore, the less gratuitously given or the less valuable to him, because granted subject to the condition of their appropriation to that end. The house and fence were to be built for the benefit of the donee, and not for the government. There was, therefore, no consideration in the performance of these acts, moving to the government, which can be regarded in the nature of a price, which is essential in all contracts of sale. The condition requiring the construction of house within a year was very generally annexed to grants made under the Mexican government in California, whether the grant embraced a city lot or leagues of land. The performance of the condition was exacted in furtherance of the general policy of the Republic to induce settlements, and not as a price to the government upon any notions of sale." The Court were also of the opinion that the fees required to be paid "were altogether incidental to the grant, and formed no part of its considera-

tion," and that the title to the lot vested in Noé, as his separate estate.<sup>1</sup>

§ 134. **Property purchased before marriage remains the separate property of the spouse by whom it was so purchased, though the conveyance was not made until after the celebration of the marriage. If the purchase be made before marriage, and money be thereafter drawn from the community funds to complete the payment, the property is nevertheless, in Louisiana, considered as separate property, but the funds so drawn are a charge in favor of the community and against the spouse for whose benefit they have been appropriated.**<sup>2</sup>

§ 135. **Rights of property acquired during coverture are not divested from the community by the death of either member thereof, before the acquisition of a perfect legal title. In Texas, C and his wife, in 1846, settled a tract of land, and continued to occupy the same until her death in 1848. After her death, her husband, continuing on the land, received, in 1850, from the commissioner acting for the State, a certificate, as a married man, for six hundred and forty acres of land. The claim was made before the commissioner after the death of the wife, but was based upon settlement perfected in her lifetime, and allowed accordingly. In a contest between the husband, claiming the lands as his separate estate, and the children, claiming as heirs of their mother, the Court thought that there could "be no question that the land was the community property of C and his wife, or, to speak more accurately, that C and his wife acquired such inchoate right, by their settlement and occupation of the land, as entitled the surviving husband to have the certificate issue to him, and that, when the land was secured by the certificate issued by Ward, commissioner, and the subsequent survey, the title inured to the benefit of the heirs of the deceased wife."**<sup>3</sup> The principles here applied to title acquired by oc-

<sup>1</sup> Noé v. Card, 14 Cal. 595. See also Wilson v. Castro, 81 Cal. 420; Scott v. Ward, 18 Cal. 468; Fuller v. Ferguson, 26 Cal. 546.

<sup>2</sup> Lawson v. Ripley, 17 La. 251.

<sup>3</sup> Cannon v. Murphy, 31 Tex. 407.

cupation in the lifetime of the wife, are equally applicable where property has been purchased by the husband during coverture, and the conveyance, in pursuance of such purchase, is made subsequent to the death of his wife.<sup>1</sup> The rights of the wife's heirs can only be enforced against the husband, or against some one claiming under him, with notice that he held the title in trust for the community.<sup>2</sup>

§ 136. **A gift in the name of both husband and wife** may be shown to have been intended for her sole benefit. The Supreme Court of Texas, in considering a case involving this question, reasoned as follows: "The evidence shows that the donor intended the husband to act as trustee. Had the gift been to the husband alone, it might have been shown by parol evidence that the gift was in trust for the use of the wife. It has been held in several cases that the creation of trusts by parol, and the proof of them by parol evidence, has not been prohibited by the statutes of this State; and if a trust for the wife, by parol, could be fastened upon a separate gift to the husband, much more naturally and reasonably would it attach to a joint gift to the husband and wife. We conclude that parol evidence was admissible to show that the gift, though joint to husband and wife on the face of the deed, was intended and should operate only as gift to the wife."<sup>3</sup>

§ 137. **Lands purchased with the separate property of the wife, but conveyed to the husband, are nevertheless, in California, as between the husband and wife, her separate property.**<sup>4</sup> Whether the decisions declaring such property to be the separate estate of the wife, are to be understood as meaning that she is invested with the legal title, does not clearly appear. It is far more probable that, upon this precise question being presented, the Court would hold that the husband held the legal estate in trust for his wife. This seems to be the view of the matter sustained by the adjudications upon this subject in Texas.<sup>5</sup> But in Louisiana, if property be purchased in the name of the husband, but paid

<sup>1</sup> *Morris v. Covington*, 2 La. An. 259.

<sup>2</sup> *Sexton v. McGill*, 2 La. An. 190.

<sup>3</sup> *Dunham v. Chatham*, 21 Tex. 247.

<sup>4</sup> *Rich v. Tubbs*, 41 Cal. 84.

<sup>5</sup> *Dunham v. Chatham*, 21 Tex. 247.



for out of the separate estate of the wife, it becomes assets of the community, but the price given constitutes a legal charge in favor of the wife against the community.<sup>1</sup> "The husband, employing a fund belonging to the wife, in the purchase of property in his own name, without her consent, becomes the owner as head of the community, and owes to his wife the amount thus employed."<sup>2</sup> In all cases, in Louisiana, where it shall be proved that the husband has received the amount of any paraphernal property alienated by the wife, or has "otherwise disposed of the same for his individual interest, the wife shall have a legal mortgage on all the property of her husband for the reimbursing of the same."<sup>3</sup>

§ 138. The improvements made upon the separate estate of either of the spouses, during the marriage, were, like other property acquired during coverture, assets of the community, unless paid for out of separate funds, or procured otherwise than by onerous title. But where the improvements were fixtures attached to the soil, and could not, in the nature of things, be divisible in specie, the community estate was reimbursed for their cost out of the separate estate of the spouse upon whose property the improvements had been constructed.<sup>4</sup>

§ 139. In Texas, crops grown upon the separate land of the wife, and cultivated by her slaves, are nevertheless community property. The statute allows her to retain the increase of her lands as her separate estate. The Supreme Court conceded that the terms "increase of lands" were sufficient to include crops raised thereon; but thought that to allow the words to have this meaning "would lead to results wholly inconsistent with the recognized principles of law upon which the system of community is based." \* \* \* "The principle," said the Court, "which lies at the foundation of the whole system of community property is, that whatever is acquired by the joint efforts of the husband and wife

<sup>1</sup> *Brown v. Cobb*, 10 La. 181; *Le Blanc v. Le Blanc*, 20 La. An. 207.

<sup>2</sup> *Comeau v. Fontenot*, 19 La. 407.

<sup>3</sup> Civil Code La. Art. 2367.

<sup>4</sup> *Rice v. Rice*, 21 Tex. 66; *Frique v. Hopkins*, 4 Mart. N. S. 220; *Dominguez v. Lee*, 17 La. 300; *Hughey v. Barrow*, 4 La. An. 249; *Noé v. Card*, 14 Cal. 595.



shall be their common property. It is true, that in a particular case, satisfactory proof might be made that the wife contributed nothing to the acquisitions; or, on the other hand, that the acquisitions of property were owing wholly to the wife's industry. But from the very nature of the marriage relation, the law cannot permit inquiries into such matters. The law therefore conclusively presumes that whatever is acquired, except by gift, devise, or descent, or by the exchange of one kind of property for another kind, is acquired by their mutual industry. If a crop is made by the labor of the wife's slaves on the wife's land, it is community property, because the law presumes that the husband's skill or care contributed to its production; or, that he, in some other way, contributed to the common acquisitions."<sup>1</sup>

§ 140. "The increase of slaves and animals, by the early laws of Spain, belonged to the spouse who brought them into marriage. By the later statutes, however, and the modern jurisprudence of that country, the produce of these things are considered to result as much from the care and solicitude of the possessors as from nature; and that, as such, they form a part of the gains which are to be divided between the husband and wife."<sup>2</sup> In Texas, the children of a slave were held to be the property of the spouse to whom the mother belonged;<sup>3</sup> but the increase of all other animals owned by either spouse, was deemed to be community property.<sup>4</sup> In California, a man, engaged in the business of dealing in live stock, had accumulated, at the time of his marriage, about twenty thousand dollars worth of property, consisting of horses, cattle, and some money. After the marriage, he continued in business as before, for about five years, when he died, leaving an estate of the value of about forty thousand dollars, and composed of four thousand dollars worth of the stock possessed at his marriage, and of the increase of such stock, together with other stock bought with the proceeds of sales of the original stock. The Court held

<sup>1</sup> *De Blane v. Lynch*, 23 Tex. 28; *Forbes v. Dunham*, 24 Tex. 611.

<sup>2</sup> *Ducrest v. Bijean*, 8 Mart. N. S. 198; *Bonner v. Gill*, 5 La. An. 680.

<sup>3</sup> *Cartwright v. Cartwright*, 18 Tex. 629.

<sup>4</sup> *Howard v. York*, 20 Tex. 670; *Bateman v. Bateman*, 25 Tex. 270.

“that as the deceased was engaged in no other business, the profits, or common property, were made up and constituted by the difference between the original value of the capital and the value of the property held at the time of the death, less the community debts.”<sup>1</sup>

§ 141. **Rents, Produce, and Profits in California.**—By section fourteen of article eleven of the Constitution of the State of California, “All property, both real and personal, of the wife, owned or claimed by her before marriage, and that acquired afterwards by gift, devise, or descent, shall be her separate property.” The Legislature, subsequently to the adoption of this Constitution, enacted that the rents and profits of the separate estate of either husband or wife should be deemed common property, except in certain cases specified in the act. The Supreme Court declared this act unconstitutional and void, so far as it operated upon the separate estate of the wife. The terms separate property, according to the views of the Court, included not merely the legal title, but also the right to the beneficial enjoyment of property. “It is not perceived,” said the Court, “that property can be in one, in full and separate ownership, with a right in another to control it, and enjoy all its benefits. The sole value of property is in its use: to dissociate the right of property from the use in this class of cases, would be to preserve the name—the mere shadow—and destroy the thing itself, the substance.”<sup>2</sup> The same Court subsequently applied what it deemed the logical conclusions resulting from the decision above referred to, in a case where the husband had ostensibly carried on the business of farming lands belonging to his wife. The husband and wife resided on these lands. He had raised a crop of wheat, which was attached on a writ issued against him. Whereupon the wife sued the attaching officer for damages occasioned by his levy; and the officer claimed that the husband had, from the circumstances of its production, some interest in the crop. The wife’s claim was sustained, because “all property which can be shown to belong to the separate

<sup>1</sup> *Lewis v. Lewis*, 18 Cal. 659.

<sup>2</sup> *George v. Ransom*, 15 Cal. 323; *Spear v. Ward*, 20 Cal. 674.

estate of the wife, by satisfactory testimony, whether the same be real, personal, or mixed, and all the rents, issues, and profits thereof, whether the same be the fruit of trade and commerce, of loans and investments, or the spontaneous production of the soil, or wrested from it by the hand of industry, is, under the Constitution, sacred to the use and enjoyment of the wife. \* \* \* The husband cannot, by any independent act of his, acquire an interest in the separate estate of the wife. It is even doubtful whether the Legislature can confer upon him, against her consent, a dominion over her property sufficient for the purpose of management or control. However that may be, it cannot go beyond that point. That the husband cannot, by his management, supervision, or labor, acquire any interest in the estate itself, is conceded; and by parity of reasoning, he cannot acquire any interest in the increase, for that is hers also, and upon the same terms—the latter being a corollary of the former proposition.”<sup>1</sup>

§ 142. **Mixed Title.**—A tract of land may be owned partly by one of the spouses as his or her separate estate, and partly by the community. If a purchase be made in the name of the wife, and part only of the price be paid out of her separate estate, she acquires “a separate interest in the land in proportion to the amount of the purchase price paid for out of her separate property; and the balance of the purchase, not paid for with the separate means of the wife, is community property.”<sup>2</sup>

**PRESUMPTION THAT PROPERTY IS COMMUNITY.**

§ 143. **The presumption of law in regard to all property** acquired by or in the name of either husband or wife during the continuance of the marital relations, is that it is community property. This presumption, as we shall hereafter show, is not conclusive. But it must first be removed by satisfactory evidence before any of the acquisitions of the spouses, vesting in them, or either of them, subsequently to the marriage,

<sup>1</sup> Lewis v. Johns, 24 Cal. 102.

<sup>2</sup> Claiborne v. Tanner, 18 Tex. 72; Love v. Robertson, 7 Tex. 6.

can be treated as separate property. So if the date of the acquisition be so uncertain that it cannot be clearly ascertained whether it belongs to the community or not, all doubts will be determined against those asserting the existence of a separate estate. There may also be a doubt whether the community existing between the spouses was legal or conventional. And here the burden of proof is upon those who seek to have the community treated as conventional. If the wife admits the existence of an antenuptial agreement, affecting her marital relations in regard to property, still she is not bound to keep possession of the agreement and produce it whenever a contest may arise between herself and the heirs of her husband. "A wife seldom takes the precaution of preserving a copy of her marriage contract. It is deposited with the notary for the benefit of every person interested therein; and when she places her person and property in the power of a man, a woman seldom keeps her papers from him. The law rendering the wife, by the marriage alone, a sharer of the property acquired by the husband, if this advantage was renounced by the marriage contract, or if any other change was made in the provisions of the law, *he* ought to produce the contract."<sup>1</sup>

It may be stated as a general principle of law, applicable at least in every part of North America where the *communio bonorum* has been adopted in any form or to any extent, that all property held by husband and wife, or either of them, or standing in the names of both, or in the name of either, is presumed to belong to the community, until the contrary is shown.<sup>2</sup> This presumption, according to some of the authorities, may be more easily overcome when a deed is taken in the name of the wife, than when one is taken in the name of the husband, because it is much more unusual for conveyances intended for the benefit of the community to be made to the

<sup>1</sup> *Bruneau v. Bruneau's Heirs*, 9 Mart. 219.

<sup>2</sup> *City Ins. Co. v. Steamboat Lizzie Simmons*, 19 La. An. 249; *Bouligny v. Fortier*, 16 La. An. 218; *Block v. Melville*, 22 La. An. 147; *Sulstrang v. Belts*, 24 La. An. 295; *Huston v. Curl*, 8 Tex. 242; *Love v. Robertson*, 7 Tex. 11; *Higgins v. Johnson*, 20 Tex. 394; *Barbour v. Fairchild*, 6 Lower Canada Rep. 113; *Succession of Wade*, 21 La. An. 345; *Chapman v. Alden*, 15 Tex. 278; *Smith v. Smith*, 12 Cal. 224; *Ford v. Ford*, 1 La. Rep. 206; *Smalley v. Lawrence*, 9 Rob. La. 214; *Fisher v. Gordy*, 2 La. An. 763; *Scott v. Ward*, 13 Cal. 470; *Mitchell v. Marr*, 26 Tex. 331; *Cooke v. Bremond*, 27 Tex. 457; *Provost v. Delahoussaye*, 5 La. An. 610.

former than to the latter. "This invariable presumption, which attends the possession of property by either spouse during the existence of the community, can only be overcome by clear and certain proof that it was owned by the claimant before marriage, or acquired afterwards, in one of the particular ways specified in the statute, or that it is property taken in exchange for, or in the investment, or as the price of, original property so owned or acquired. The burden of proof must rest with the claimant of the separate estate. Any other rule would lead to infinite embarrassment, confusion, and fraud. In vain would creditors or purchasers attempt to show that the particular property seized or bought was *not* owned by the claimant before marriage, and was *not* acquired by gift, bequest, devise, or descent, or was *not* such property under a new form consequent upon some exchange, sale, or investment. In vain would they essay to trace, through its various changes, the disposition of any separate estate of the wife, so as to exclude any blending of it with the particular property which might be the subject of consideration."<sup>1</sup> When the wife alleges that property levied upon as community assets is her separate estate, because it was acquired after the dissolution of the community of property, or after a judgment of separation of property between herself and her husband, the presumption that it is common property must be rebutted by her, and if the judgment of separation of property be attacked by the creditor on that ground, she must show affirmatively its reality and good faith.<sup>2</sup>

§ 144. A deed taken in the name of the wife was referred to in the preceding section; and the statement was there made that, according to some of the authorities, such a conveyance did not create so strong a presumption that the property thereby acquired became community, as though the deed were taken in the name of the husband. In one of the authorities thus referred to, this question is discussed and determined as follows:

"A deed of purchase, taken in the name of the husband or

<sup>1</sup> Meyer v. Kinser, 12 Cal. 253.

<sup>2</sup> Webb v. Peet, 7 La. An. 92; Harden v. Nutt, 4 La. An. 66; Dennistoun v. Nutt, 2 La. An. 483.

the wife, has a twofold aspect or character. It may be a conveyance of separate, or it may be a conveyance of common property, though as a general rule the purchase belongs to the community; and therefore arises the presumption, that though the deed, upon its face, conveys a separate right to the husband or wife, yet the conveyance is in fact for the benefit of the community. The presumption that the deed to the husband is a conveyance to the community is, under ordinary circumstances, much more strong than when the deed is to the wife. The husband has the active dominion and control over the common property. He can alienate, exchange, or dispose of it, without the consent of his partner in matrimony; and his acts, if not done with a fraudulent intent to her injury, will be good. He sells and purchases in his own name. Conveyances are rarely taken by the husband in the joint name of himself and wife, or in her name alone; and therefore, when made in the name of the wife, by the direction of the husband, the presumption that the property belongs to the common gains has not the force attached to it when arising upon a deed to the husband in his own name."<sup>1</sup>

The language here employed clearly indicates that the presumption that a conveyance to one of the spouses is for the benefit of the community, is not so strong when the conveyance is to the wife as when it is to the husband. But this language was employed in the consideration of a controversy arising between a wife and the creditors of her husband, the debts being contracted after the making of the conveyance. This controversy could be determined on the same principles as though it were between the husband and wife, as, under these circumstances, the creditors had acquired no greater rights than were vested in the husband subsequently to the conveyance. Therefore, if the language quoted can be regarded as establishing the rule that stronger proof is required to rebut the presumption arising from a conveyance to a hus-

<sup>1</sup> *Higgins v. Johnson*, 20 Tex. 395; approved in *Smith v. Boquet*, 27 Tex. 513. In the last named case the statement is made, that if the husband "purchase with his separate property or community funds, and take the title in the name of the wife, the presumption, as between themselves and all others not claiming as innocent purchasers, will be that the property was intended for her and not for himself or the community."

band than would be necessary to accomplish a like result if the conveyance were to the wife, this rule must, in its operation, be limited to controversies between husband and wife, or between the husband or wife and some third person, who is not to be regarded as a purchaser without notice. But the general rule seems to be too well established to admit of any considerable doubt, that the fact that the title is taken in the name of the wife "does not raise even a presumption in her favor."<sup>1</sup>

§ 145. To rebut the presumption that a conveyance made to one of the spouses was intended for the benefit of the community, evidence may, at least as against either husband or wife, and those claiming under them, or either of them, with notice, be introduced to show that the purchase was made with the separate funds of either spouse, or to show any other fact or facts tending to impart to the acquisition the character of separate estate.<sup>2</sup> But a more important question, and one involved in more doubt, is whether, as against third persons not affected by notice of its true character, a conveyance made to either husband or wife, containing no expressions on its face tending to show that it is not designed as a conveyance to the community, can be proved to be a conveyance to the grantee as his or her separate property. In Texas, it is clear that a deed made to a wife cannot be shown to be intended as a conveyance to her as her separate property, as against the grantee of her husband, unless such grantee had notice of the wife's interest. "We know of no principle upon which such evidence can be received for the purpose of explaining or modifying such deeds, after the property has passed into the hands of innocent purchasers, and thereby engrafting upon it a trust to their detriment. Such a doctrine would go far to destroy the utility of written evidences of title to land, and the registration of conveyances for the purpose of notice. The inspection of a deed only

<sup>1</sup> Smalley v. Lawrence, 9 Rob. La. 214; Davidson v. Stuart, 10 La. B. 147; Andrew v. Bradley, 10 La. An. 606; Meyer v. Kinzer, 12 Cal. 258; Kohner v. Ashenauer, 17 Cal. 581; Succession of Wade, 21 La. An. 345; Block v. Melville, 22 La. An. 147.

<sup>2</sup> Woods v. Whitney, 42 Cal. 361; Smith v. Boquet, 27 Tex. 512; Peck v. Brummagem, 31 Cal. 441; Ingersoll v. Truebody, 40 Cal. 612.



charges a party with notice of the facts which its contents import. An inspection of this deed authorized the defendant in error to infer that the property was a part of the community estate, and justified him in dealing with it as such. That the title when acquired by the community was taken in the name of the wife, imposes no additional burden upon the purchaser of inquiring as to the equities of husband and wife in respect to it."<sup>1</sup> But the decision here quoted from is certainly against reason and against a majority of the authorities on the subject. Necessarily, the rule must be different where the conveyance is made to the wife from what it is where the conveyance is made to the husband. He has full control over the community property; he alone can make a valid contract to purchase, or execute a valid conveyance. The natural way of conducting the affairs of the community would be to take conveyances of real estate in his name. When the deed is made to the wife, the transaction is not being conducted according to the natural and usual way of acquiring community property. It is true the acquisition may be for the benefit of the community; but it is equally true that it may be for the exclusive benefit of the wife. The purchaser, as he derives title through this deed, is, of course, charged with notice of its contents, and of the fact that the wife alone is named as a grantee. That she is so named, is inconsistent with the ordinary course pursued in obtaining community assets, but agreeable to the methods naturally and necessarily employed in acquiring title to be held as her sole and separate estate. Ought not a purchaser to be required to exercise some care in ascertaining why this business has been conducted in her name, and why a departure has been made from the common form of conveyances intended for the benefit of the community?

§ 146. **The Courts of the State of Louisiana have considered the question referred to in the preceding section, and have reached a conclusion very different from that subsequently announced by the Supreme Court of Texas. "It is true," said the Supreme Court of Louisiana, "as a general rule, that the law considers to be common property that which**

<sup>1</sup> *Cooke v. Bremond*, 27 Tex. 460.



is acquired by husband and wife during the marriage, although the purchase be in the name of one of the two, and not of both. The reason is, that in that case, the period of time when the purchase is made is alone attended to, and not the person who made it. But we are not ready to say that no distinction ought to be made when the property is clearly shown to have been bought by the separate funds of one of the parties, and particularly with the funds of the wife which never came under the administration of the husband. It is a well settled doctrine in our jurisprudence, that money received during the marriage, even by the husband, on account of the wife, does not fall into the community, but remains her separate property. According to article 2361 of the Louisiana Code, the wife has the right to administer personally her paraphernal property without the assistance of her husband; and by article 2315, paraphernal is considered as the separate property of the wife. There necessarily results from these provisions of the law a power allowed to the wife to administer alone her paraphernal estate as she pleases; and a right to alienate her separate property, and to invest her paraphernal funds in whatever manner she thinks proper and most advantageous to her interest, provided she does it with the authorization of her husband."<sup>1</sup> The principles announced in the opinion from which the preceding quotation was made were, a few years later, applied by the same Court, in a contest between the wife and the creditors of the husband. The creditors insisted that if the separate property of the wife had been employed in the purchase, this fact should have been expressed in the act by which she acquired the property; but the Court disposed of this claim as follows: "The objection does not appear to us to be founded in law. In regard to creditors, such a statement would of itself be without effect, except in giving notice to third persons. But as the husband is the head and master of the community, having alone the administration, a purchase in the name of the wife would not be in the usual course of business, and consequently would be sufficient to put third persons upon inquiry. As this rule seems to be applicable to promissory notes signed by the wife,

<sup>1</sup> *Dominguez v. Lee*, 17 La. 299.

we see no reason why it should not be equally applicable to other contracts entered into by her. The wife, if required, would be bound in all cases to establish the reality of the sale to her, *dehors* the act; and the same proof would be necessary in order to make her acknowledgment in the act binding upon her.”<sup>1</sup>

§ 147. **Conveyance to Wife, Rule in California.**—The language quoted in the last section clearly indicates that the Court considered that the fact that a conveyance was made to the wife was sufficient to put the purchaser upon inquiry in reference to the true intent and effect of the deed. But as the controversy arose between the wife and her husband’s creditors, and not between her and the husband’s grantee, the language of the Court has only the force which may be accorded to an emphatic declaration of the opinion of the Court upon a matter considered by way of illustration or argument, but not necessary to the determination of the case. But the question has been put in issue and determined in California, as will sufficiently appear from the following extract from an opinion prepared by Judge Sawyer:

“In this case, it was shown to the satisfaction of the Court, that the premises in question were purchased with funds belonging to the separate estate of the wife. They became, therefore, in fact, her separate property. The conveyance was upon the face to the wife. The apparent record title was in her, and not in her husband, Silas Fuller. The deed is sufficient in law to convey a title to the wife, but whether it did, in fact, convey an estate in common, or a separate estate, manifestly depended upon a fact *dehors* the deed. Ostensibly, the intent was to vest the title in the grantee named, Jane E. Fuller. It did not appear on the face of the deed that the grantee was a married woman—or that, being a married woman, the consideration was paid out of her separate estate. The deed, then, so far as shown upon its face, might have conveyed a title absolute to a *feme sole*, a separate estate to a *feme covert*, or an estate in common to husband and wife. Upon the best view for the plaintiff, the deed upon its face

<sup>1</sup> Metcalf v. Clark, 8 La. An. 287. See also Gonor v. Gonor, 11 Rob. La. 526.

was equivocal. But it afforded to all persons, seeking to acquire title under it, a clue to the title, which they were bound to pursue, or suffer the consequence of their laches. The grantee is a woman. The presumption of law is that she is sole, and *prima facie* a conveyance from her would pass the title. But she may be married, and her deed may not pass the title. The fact as to whether she is married or single, all parties dealing with the land must ascertain, or omit to do so at their peril. So, also, if a grantee of a conveyance for a money consideration is a married woman at the date of the conveyance, *prima facie* a conveyance by the husband, in his own name, of the land so conveyed to the wife, will be presumed to pass the title; but in fact it may not, for the reason that the land may still be the separate property of the wife, which he had no power to convey. And in such cases, as in the case last mentioned, all parties claiming title through the husband to lands, the title to which never stood in his name, must ascertain, at their peril, whether he did in fact have the power to convey.

The record title in this case was notice to all the world that the land in dispute might be the separate property of Mrs. Fuller, and every party dealing with it did so at his peril. The plaintiff was, by the record, put upon inquiry as to the true condition of the title. The grantee upon the record was capable of taking the land, and was a different person from the one from whom the plaintiff derives his title. If the plaintiff did not avail himself of the means afforded by the record to ascertain the true state of the title, it is his own fault, and he cannot claim to be an innocent purchaser."<sup>1</sup>

§ 148. **Authority of Husband and Wife respectively.**—Under all the forms of community existing in North America, the husband has the exclusive control and management of the common property, with the right to convey or encumber it as he may deem proper.<sup>2</sup> The only limitation upon his power in this respect is, that he shall not employ it for the

<sup>1</sup> Ramsdell v. Fuller, 28 Cal. 43; approved, Peck v. Vandenberg, 80 Cal. 36.

<sup>2</sup> Higgins v. Johnson, 20 Tex. 396; Brewer v. Wall, 23 Tex. 588; Prinn v. Barton, 18 Tex. 206; Wright v. Hays, 10 Tex. 132.

purpose of defrauding his wife of her interest as a member of the community. "A deed of gift of a portion of the common property by the husband is not void *per se*. If the gift be made with the intent of defeating the claims of the wife in the common property, the transaction would be tainted with fraud. In the absence of such fraudulent intent, a voluntary disposition of a portion of the property, reasonable in reference to the whole amount, is authorized by the statute, which gives to the husband the absolute power of disposition of the common property as of his own separate estate."<sup>1</sup> But in Louisiana, the code prohibits the husband from making any "conveyance *inter vivos* by a gratuitous title of the immoveables of the community, nor of the whole or of a quota of the moveables, unless it be for the establishment of the children of the marriage. Nevertheless, he may dispose of the moveable effects by a gratuitous title to the benefit of all persons."<sup>2</sup> If a note, made in consideration of community property, or from any cause forming a part of the community assets, is given to and in the name of the wife, the husband, as the head of the community, can sue thereon in his own name.<sup>3</sup> But the authority vested in the husband, as the head of the community, and by virtue of which he is authorized to control and dispose of its assets, may, at least in Texas, be transferred from him to the wife, by his abandonment of his position of head of the community, or by his total incapacity to transact the business affairs of the marital partnership. In the case in which this question was first determined, the husband left his wife in Texas, and sought an asylum on the Rio Grande, beyond the limits of his State. Here he remained for more than five years. During all that time, the wife remained at home, took care of herself and family, and assumed general control over the community effects. About two years after she had been thus left by her husband, she acquired title, in her own name, to a tract of

<sup>1</sup> Lord v. Hough, 43 Cal. 584.

<sup>2</sup> Civil Code La. Art. 2373; Bister v. Menge, 21 La. An. 216; Glenn v. Elam, 8 La. An. 611.

<sup>3</sup> Crow v. Van Sickle, 6 Nev. 148; Beigel v. Lange, 19 La. An. 112. The law presumes a note made to the wife to be community property. Wells v. Cochrane, 13 Tex. 128; Hemmingway v. Matthews, 10 Tex. 207; Tryon v. Sutton, 13 Cal. 490.

land, and nearly four years after, she made a deed of gift to her son of a portion of this acquisition. The validity of this conveyance was subsequently drawn in question, and was sustained by the Supreme Court. In pronouncing judgment, the Court announced the following views in regard to the respective rights and powers of the husband and wife: "Their rights of property in the effects of the community are perfectly equivalent to each other. The difference is this, that, during coverture, her rights are passive; his are active. He has the free administration and disposition (if untainted by fraud against the wife) of such property; and he is subject to the corresponding duty of maintaining his wife and family, and defraying out of this property the debts contracted during marriage. So long as he discharges his duty as a husband, his superior rights remain, unquestionably, in full vigor. But when he abandons the administration of the common property, deserts his wife and country; when he ceases the discharge of his duties, and contributes in no mode to the support of his wife and family, reducing the wife to the necessity of providing for them, and of taking care of the common property, or, otherwise, suffering it to go to waste; and when this absence is prolonged several years—do not his rights over the effects of the community, from the nature of things, cease? and are not the passive rights of the wife quickened into vigorous activity?

"She is necessarily compelled to assume the position of the husband; to discharge his duties, and incur his responsibilities; and her powers should correspond to the position which, by the default of the husband, she is thus compelled to assume; and especially should the controlling power of the husband, over the goods of the community, be transferred to the wife. Her right in the property is equal to that of the husband. During his presence, he has the administration, subject to the trusts incumbent on the property. This right of control must necessarily cease where he can and will no longer exercise it; and the wife, the other joint owner, must be vested with the authority, or it cannot exist anywhere."<sup>1</sup>

<sup>1</sup> *Wright v. Hays*, 10 Tex. 133. Where the husband is absent, there is no reason or rule of law prohibiting the wife from making such contracts respecting the commun-

§ 149. Upon the decease of either of the spouses, the community is at once terminated. The survivor, whether husband or wife, cannot alienate any more than his or her moiety, nor make any contracts imposing any liability upon the share of the deceased spouse.<sup>1</sup> By the law of community, as it existed in Spain, and as it still exists in Texas<sup>2</sup> and Louisiana,<sup>3</sup> upon the death of either spouse, his or her moiety immediately vested in his or her heirs, subject to its proportion of the community debts. The same rule prevailed in California until the year 1861.<sup>4</sup> At that time, the statute defining the rights of husband and wife was so amended as to provide that upon the dissolution of the community by the death of the wife, the entire common property shall, without administration, vest in the husband; but upon the dissolution by the death of the husband, one-half of the common property vests in the wife, and the other half is subject to the testamentary disposition of the husband; and in default of such disposition, goes to his descendants. The husband cannot, by any testamentary disposition, affect the wife's interest in the community property.<sup>5</sup>

ity property as are necessary for its preservation, or for the support of herself and children. *Cheek v. Bellows*, 17 Tex. 616; *Fullerton v. Doyle*, 18 Tex. 12. During the insanity of the husband, the wife becomes the head of the community, and has the same powers as in case of his abandonment of her. *Forbes v. Moore*, 32 Tex. 199.

<sup>1</sup> *Broussard v. Bernard*, 7 La. 222. This case is in harmony with the two preceding citations; but is opposed by *Jones v. Panaud*, 1 Cal.

<sup>2</sup> *Thompson v. Cragg*, 24 Tex. 598.

<sup>3</sup> *Walker v. Kimbrough*, 23 La. An. 637.

<sup>4</sup> *Broad v. Broad*, 40 Cal. 496.

<sup>5</sup> *Conn v. Davis*, 33 Tex. 208; *Estate of Silvey*, 42 Cal. 212.

## **CHAPTER VIII.**

### **RELATIONS OF COTENANTS.**

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**§ 150. General Statement and Division of the Subject.—**

It is self-evident that two or more persons cannot own the same piece of property in undivided interests, without being placed in a different relation towards one another than though their ownership consisted of tenancies in severalty of distinct articles of personalty or of segregated parcels of real estate. In the first place, the unity of possession incident to every species of cotenancy necessarily brings those entitled to the possession in frequent contact with one another, and thereby affords to the designing abundant opportunities for securing the confidence of the unwary. The interests of the different co-owners seem so identical that neither is likely to mistrust the other of harboring any schemes at variance with a continued reliance upon and respect of the common title. And while the relation of cotenancy is generally thus productive of sentiments of mutual trust between the several owners, it would, but for the imposition of legal restraints, enable each to betray those trusts, by taking advantage of those infirmities in the common title, which, by reason of his common interest, had been disclosed to him. In the second place, the fact that the interest of each cotenant can usually be advanced only through the general welfare of all, naturally induces one to act for the advantage of the other; and creates a presumption, in the absence of circumstances indicating a different design, that the act of one is intended for the benefit of all. In the third place, the fact that each cotenant is in law deemed to be in possession with the others, and is in fact often appar-



ently in the exclusive possession, frequently invests one of the cotenants with the most important indicia of title, and leads third persons to believe either that he is the sole owner, or at least the accredited agent of all the owners.

It is not to be expected that any system of jurisprudence, which, like the common law, is to a great extent composed of the precedents made, from time to time, by the application of preconceived ideas of justice to the actual and ever varying exigencies of business affairs, would be created without adapting itself to the various relations under which men may be called upon to act; nor without containing distinct recognitions of the principle, that an act proper and harmless enough in some of the relations of life, should be discountenanced and forbidden in others. And therefore, as cotenants must always in fact have stood in different relations towards one another, than though they were tenants in severalty, the common law came into being recognizing those differences, and creating such rules as their existence made necessary. These rules are the subject of this chapter; and in attempting to show what they are, we shall consider our subject under the three divisions in which, in our judgment, it is naturally divided: 1st. What restraints are imposed by law to prevent a cotenant from betraying the trust arising out of the fact of cotenancy; 2d. What acts may a cotenant safely presume to exist in support of, and in subordination to, the common claim of right; and 3d. By what acts, and under what circumstances, can one cotenant affect the others, in dealing with third parties.

#### RESTRAINTS ARISING FROM FACT OF COTENANCY.

§ 151. **Relations are those of Mutual Trust.**—All the restraints imposed upon cotenants in regard to their dealing between one another in reference to the common property, are founded mainly, if not exclusively, upon the theory that, so far as the common subject of ownership is concerned, they are each bound to defend the interest of the other; or if not to defend, at least not to make any direct or indirect assault upon such interest. The case of tenants in common coming into joint possession of real estate as co-heirs or co-devisees,

has always been spoken of as creating special obligations between the joint owners; in fact, as forbidding either to do any act which could be unlawful or improper, if done by a trustee charged with the care and preservation of a trust estate. The general theory of the law upon this subject is correctly represented by the following extract from an opinion delivered in the highest judicial tribunal of the State of Tennessee:

“Tenants in common by descent are placed in confidential relations to each other by operation of law, as to the joint property, and the same duties are imposed as if a joint trust were created by contract between them, or the act of a third party. Being associated in interest as tenants in common, an implied obligation exists to sustain the common interest. This reciprocal obligation will be enforced in equity, as a trust. These relations of trust and confidence bind all to put forth their best exertions, and to embrace every opportunity to protect and secure the common interest, and forbid the assumption of a hostile attitude by either.”<sup>1</sup>

Tenants in common by descent are under no other or greater obligations towards one another than other cotenants frequently are. Where two or more come to an estate by devise or descent from a common source of title, the relations between them are presumed to be relations of trust and confidence. Such a presumption may not appear so strong where the cotenants acquire their respective interests, at different times and by different conveyances; and it may, in certain cases, disappear altogether. But where the cotenants acquired their interest by a joint conveyance, under which they both went into possession, there can be no doubt that the relation necessarily produced is as much one of trust and confidence as though it originated in devise or descent. And even where the cotenants come to their titles at different times and from different grantors, they may, by being in the actual joint possession, and by a course of behavior in reference to one another and to the common subject of ownership indicating an intent to support and respect the common title, create relations

<sup>1</sup> *Tisdale v. Tisdale*, 2 Sneed, 599. See also *Van Horne v. Fonda*, 5 Johns. Ch. 388; *Lee v. Fox*, 6 Dana. 171; *Picot v. Page*, 26 Mo. 421.

of mutual trust and confidence as strong in fact and as worthy of consideration in law, as the relations growing out of the acquisition of title from a common source, by the same purchase or descent. If two or more agree to become tenants in common of a tract of land, and one of their number is deputed to make the necessary negotiations for its purchase, at the most reasonable price for which it can be obtained, he occupies such a relation towards the others as binds him to guard their interests, and to make no profit for himself in the transaction. If he represents to them that the land can be had at a specified price, and they thereupon contribute to the purchase by paying their proportion of this price, they may, upon discovering that he in fact procured the land for less than the amount represented, retain their interest in the land, and recover back from him the amount paid by them in excess of their proportions of the true price.<sup>1</sup>

§ 152. **One cannot assail Common Title.**—"The rule of law, that a person coming into possession of lands under the agreement or license of another, cannot be permitted to deny the title of the latter, when called upon to surrender, is of almost universal application."<sup>2</sup> This principle extends to one who takes possession by virtue of a claim of title, of which title he is cotenant with others. Upon any contest arising between himself and his cotenants, he cannot, at least while remaining in possession, deny the validity of the common source of title, nor defend himself by proving that the paramount title is in some third person.<sup>3</sup> Thus, where property descended to several as co-heirs, and one of them subsequently undertook to assail the ancestor's title, the Court, in determining that he could not be permitted to do so, said: "John Streeter was the common source of title. His children, there being no will, are presumed to have taken the premises by descent, as tenants in common. It is not for the defendant to say that the common ancestor had no title, and that his possession is not as a tenant in common, but in

<sup>1</sup> *King v. Wise*, 43 Cal. 633.

<sup>2</sup> *Phelan v. Kelley*, 25 Wend. 391.

<sup>3</sup> *Braintree v. Battles*, 6 Vt. 395; *Funk v. Newcomer*, 10 Md. 301; *Burnhams v. Van Zandt*, 7 Barb. 91.

his own individual right.”<sup>1</sup> An action of ejectment was brought for the undivided one-half of a tract of land, in which the plaintiff’s claim was based upon an alleged agreement between himself and defendant to enter upon and hold the lands in controversy for their equal benefit—each to contribute his share towards the expenses of the common occupation; and that, in pursuance of such agreement, the possession was taken, and the contribution to the expenses thereof was made. One of the defenses insisted upon was that such agreement involved a contract to jump land for joint benefit, and wrongfully take it from a third person, and was therefore void, as illegal and against public policy. This portion of the defense was disposed of in the following language: “If the case of the plaintiff be otherwise established, the defendant cannot defeat it by the application of the maxim, *Ex dolo malo non oritur actio*, nor set up in his defense that both he and the plaintiff entered on the premises wrongfully in the first instance. Upon well settled principles, he cannot be permitted, if entering and remaining in possession as a tenant in common, to assail the common title or draw its validity in question.”<sup>2</sup>

§ 153. An apparent exception to the rule, that a cotenant in possession cannot assail the common title, exists where reliance is placed on an adverse occupation for a period sufficient to create a bar by virtue of the Statute of Limitations. This, though apparently an exception, is, upon close examination, found not to involve any violation of the general rule; for one cotenant who defends an action brought by another, on the ground that the latter is barred by this statute, *concedes* the title of the cotenant, and seeks to avoid it for not being asserted in proper time. A conveyance from any third person claiming under some other title may be offered in evidence by a defendant who has pleaded the Statute of Limitations against his cotenant; and when so offered, it may be received, not for the purpose of sustaining an assault on the common title, but in support of the plea of adverse holding.<sup>3</sup>

<sup>1</sup> Jackson v. Streeter, 5 Cow. 530.

<sup>2</sup> Bornheimer v. Baldwin, 42 Cal. 84.

<sup>3</sup> Phelan v. Kelley, 25 Wend. 394.

§ 154. **Purchase of Adverse Title.**—A cotenant cannot take advantage of any defect in the common title by purchasing an outstanding title or incumbrance and asserting it against his companions in interest. The purchase is, notwithstanding his designs to the contrary, for the common benefit of all the cotenants. The legal title acquired by him is held in trust for the others, if they choose, within a reasonable time, to claim the benefit of the purchase, by contributing, or offering to contribute, their proportion of the purchase money.<sup>1</sup> “This principle arises from the privity subsisting between parties having a common possession of the same land and a common interest in the safety of the possession of each, and it only inculcates that good faith which seems appropriate to their relative position.”<sup>2</sup> “It is not consistent with good faith, nor with the duty which the connection of the parties as claimants of a common subject, created, that one of them should be able, without the consent of the other, to buy in an outstanding title, and appropriate the whole subject to himself, and thus undermine and oust his companion. It would be repugnant to a sense of refined and accurate justice. It would be immoral, because it would be against the reciprocal obligations to do nothing to the prejudice of each other’s equal claim which the relationship of the parties created. Community of interest produces a community of duty, and there is no real difference, on the ground of policy and justice, whether one cotenant buys up an outstanding incumbrance or an adverse title, to disseize and expel his cotenant. It cannot be tolerated when applied to a common subject, in which the parties had equal concern, and which created a mutual obligation to deal benevolently with each other, and to cause no harm to their joint interest.”<sup>3</sup>

§ 155. **When Purchase of Adverse Title permitted.**—As the rule forbidding the acquisition of adverse titles by a

<sup>1</sup> *Titworth v. Stout*, 49 Ill. 78; *Sullivan v. McLennans*, 2 Clarke, 442; *Rothwell v. Dewees*, 2 Black U. S. 613; *Jones v. Stanton*, 11 Mo. 433; *Keller v. Auble*, 53 Pa. St. 410.

<sup>2</sup> *Venable v. Beauchamp*, 3 Dana, 324.

<sup>3</sup> *Van Horne v. Fonda*, 5 Johns. Ch. 407; *Gossom v. Donaldson*, 18 B. Monr. 230; *Picot v. Page*, 26 Mo. 421; *Brown v. Homan*, 1 Neb. 443.

cotenant, from being asserted against his companions, is always said to be based upon considerations of mutual trust and confidence supposed to be existing between the parties, the question naturally arises whether the rule is applicable where the reasons on which it is based are absent. Joint-tenants, tenants by entirety, and coparceners, always hold by and under the same title. Their union of interest and of title is so complete, that, beyond all doubt, such a relation of trust and confidence unavoidably results therefrom that neither will be permitted to act in hostility to the interests of the other in reference to the joint estate. Tenants in common, on the other hand, may claim under separate conveyances, and through different grantors. Their only unity is that of right to the possession of the common subject of ownership. As their connection is not necessarily so intimate as that of other cotenants, it may well be doubted whether they should always be subject to the restraints imposed upon the others. There are many cases in which the rule in regard to the acquisition of an adverse title by a cotenant is spoken of in general terms as applying to tenants in common, irrespective of their special and actual relations to one another. But an examination of the decisions clearly shows that tenants in common are not necessarily prohibited from asserting an adverse title. If their interests accrue at different times, and under different instruments, and neither has superior means of information respecting the state of the title, then either, unless he employs his cotenancy to secure an advantage, may acquire and assert a superior outstanding title, especially where the cotenants are not in joint possession of the premises.<sup>1</sup>

§ 156. **Purchase of Outstanding Title, when may be asserted.**—The purchase made by a cotenant of an outstanding title or incumbrance is not void, nor does the interest so acquired by him, or any part of it, by operation of law, vest in his cotenants. They may not wish to share in the benefits of his purchase; for, in their judgment, the title purchased by him may not be paramount to that before held in common.

<sup>1</sup> Roberts v. Thorn, 25 Tex. 736; Frenz v. Klotzsch, 28 Wis. 317; Wright v. Sperry, 21 Wis. 331; Brittin v. Handy, 20 Ark. 381; Matthews v. Bliss, 22 Pick. 48.

The law gives them a privilege which they may assert. This privilege consists in the right to obtain a conveyance of the title bought in, upon their paying their share of the price at which it was bought. The privilege may be waived by an express refusal to reimburse the cotenant for his outlay, or by such a course of action as necessarily implies such a refusal. The right of a cotenant to share in the benefit of a purchase of an outstanding claim, is always dependent on his having, *within a reasonable time*, elected to bear his portion of the expense necessarily incurred in the acquisition of the claim.<sup>1</sup> A most natural and material inquiry, then, is what is a reasonable time. To this inquiry no positive answer can be given. In this, as in all other questions in regard to reasonable time, no doubt each case must necessarily be determined upon its own peculiar circumstances. The cotenant asking a court of equity to award him the benefit of a purchase, must show reasonable diligence in making his election. Whatever delay he may have occasioned, must be entirely consistent with perfect fair dealing on his part, and in nowise attributable to an effort to retain the advantages, while he shirks the responsibilities, of the new acquisition. If his delay in making his election known can be justly accounted for on the theory that he was waiting as "a means of speculation for himself, by delaying until the rise of the land, or some event yet in the future, shall determine his course, he will be deemed to have repudiated the transaction and abandoned its benefits."<sup>2</sup> Therefore, where a cotenant repudiated the purchase when made, and for more than a year afterwards refused to contribute his ratio of the price, he was, in equity, denied all right to participate in the benefit of the purchase.<sup>3</sup>

§ 157. The renewal of a lease in favor of any of the lessees is governed by the rules established by law in reference to the acquisition of an outstanding title by a cotenant. The new or renewed lease is held by the lessee in whose name it is taken, in trust for his co-lessees under the old lease, in

<sup>1</sup> Lee v. Fox, 6 Dana, 177; Brittin v. Handy, 20 Ark. 403; Buchanan v. King, 22 Gratt. 414.

<sup>2</sup> Mandeville v. Solomon, 39 Cal. 133; Buchanan v. King, 22 Gratt. 414.



proportion to their respective interests.<sup>1</sup> The parties in possession under a lease are jointly entitled to participate in the benefits of a renewal. Before either can take and hold a lease to himself alone, his cotenants must have declined their portion of its benefits, or have refused to submit to their share of its obligations. But if two or more hold land by virtue of a contract to purchase, and one of them refuses to contribute his ratio of the amount unpaid, and for want of such payment, the contract is forfeited, he who was willing to pay his share may take a new contract for the whole land for his own benefit. No trust arises in favor of him who has thus "unconscientiously and inequitably refused to pay his proportion of the purchase money," and has thereby compelled the other to make the best bargain he could.<sup>2</sup>

§ 158. **Tax Title.**—As a general rule, no cotenant will be permitted to assert against his companion a title acquired by purchase at tax sale, for taxes imposed on their common property during their joint ownership. Tax titles affecting undivided interests may arise from a sale which includes the interest of all the owners, or from a sale which includes the interest of but one. Where, as in the former case, the cotenant purchasing at the sale is himself in fault, for not making payment of the amount due on his own moiety, there is no doubt that his purchase cannot be enforced against his companions, except as a basis for compelling them to reimburse him for their *pro rata* of the sum paid to release the common property from a common burden.<sup>3</sup> But where the purchasing cotenant has paid his taxes, and is therefore free from fault, and there is nothing in the relations between the parties imposing any obligation on either to pay the charge upon the moiety of the other, then it is difficult to assign any reason for restraining the tenant not in default from bidding for his own use at the tax sale. A payment by any of the tenants relieves him from liability to loss through any subsequent

<sup>1</sup> *Burrell v. Bull*, 3 Sandf. Ch. 30; *Palmer v. Young*, 1 Vern. 276; *Hamilton v. Denny*, 1 Ball & B. 199.

<sup>2</sup> *Chapin v. Powers*, 7 Paige, 147.

<sup>3</sup> *Page v. Webster*, 8 Mich. 263; *Butler v. Porter*, 13 Mich. 292; *Maule v. Rider*, 51 Pa. St. 377; *Lloyd v. Lynch*, 28 Pa. St. 419; *Downer's Admr. v. Smith*, 38 Vt. 467.



sale. If any other undivided interest be sold, it must be deducted from the moieties of those who are in default.<sup>1</sup> If the parties whose interests have been released from the tax lien are free from all further obligation, and have no interests liable to be divested by the sale, then why should not they be permitted to bid as freely and with the same effect as though the sale were under an execution issued upon a separate judgment against the other cotenant? In California, a sale of the whole property to a tenant in common has been held to pass the legal title to him, on the ground that the "statute under which the sale was made gives conclusive effect to the deed, except as against actual frauds and prepayment of taxes." The decision here referred to was made upon an appeal from an order granting the purchaser a writ of assistance to place him in possession of an undivided interest in certain real estate: That, even under this statute, the purchaser may be treated in equity as a trustee for his cotenant, is certainly inferable from the following reasoning of the Court: "As a general rule, neither a tenant in common nor a mortgagee can acquire a tax title and set it up against his cotenant or mortgagor; but this rule rests on the doctrine of constructive frauds, and is not applicable in a case like the present, where the fraud must be actual. It is possible that in equity the purchase would be regarded as a trust, and relief administered on that ground, but in this proceeding the defendant cannot avoid the effect of the deed. He must present a proper case for equitable interference before the assistance of the Court can be invoked in his behalf. His defense is based on the invalidity of the deed, and under the statute the deed cannot be rejected as void."<sup>2</sup>

§ 159. **Repurchase after Lapse of Time to Redeem.**—In Pennsylvania, it seems to be well established that if land be sold for taxes and the time for redemption passed, so that an absolute and indefeasible estate vests in the purchaser, any prior existing cotenancy in such land, together with the relations and obligations incident to such cotenancy, is determined and set at naught. Therefore, either of the late co-

<sup>1</sup> *Braker v. Devereaux*, 8 Paige, 513.

<sup>2</sup> *Mills v. Tukey*, 22 Cal. 379.

tenants may acquire from the purchaser at the tax sale the title which he thereby obtained, and may hold such title free from all trusts and obligations in favor of his former cotenant.<sup>1</sup> In the case in which this conclusion was first reached, the period for redemption had expired some eighteen years prior to the purchase by one of the late cotenants from the grantee of the tax deed. But in a subsequent case, the period intervening after the termination of the time allowed for redemption, and before the purchase of the tax title by one of the part owners, was not more than one year. If a long period elapses after the creation of a tax title, and the purchaser is regarded and treated by the late cotenants as the true owner, and the latter, on their part, have abandoned all pretensions to the property, then it may be that either of them is at liberty to disregard his former relations, and to purchase the whole property for himself. But under any other circumstances, it seems to us that the Pennsylvania cases do not represent the true state of the law, because they are directly in conflict with the well settled rule that a person under "any legal or moral obligation to pay the taxes cannot, by neglecting to pay the same and allowing the land to be sold in consequence of such neglect, add to or strengthen his title by purchasing at the sale himself, or by subsequently buying from a stranger who purchased at the sale. Otherwise, he would be allowed to gain an advantage from his own fraud or negligence in failing to pay the taxes."<sup>2</sup>

§ 160. The husband of a tenant in common, or of a coparcener, stands in such a relation to the property that his acquisition of an outstanding claim will be treated as though he were himself one of the cotenants. The information which he would naturally acquire in regard to the common estate, the fact that he would, at common law, be entitled to the management and profits of his wife's moiety, and would thereby be enabled to obtain the confidence of the other owners, bring him as much within the reason of the rule as

<sup>1</sup> *Lewis v. Robinson*, 10 Watts, 354; *Kirkpatrick v. Mathiot*, 4 Watts & S. 251; *Reinboth v. Zerbe Run Improvement Co.*, 29 Pa. St. 143.

<sup>2</sup> *Moss v. Shear*, 25 Cal. 45; *Coppinger v. Rice*, 33 Cal. 425.

though he were one of the immediate cotenants.<sup>1</sup> But an executor of one cotenant may buy the moiety of another cotenant for his own use. The purchase will not be held in trust, because it is not the purchase of an *outstanding* or *adverse* title, nor of anything in reference to which there was any fiduciary relation between the executor and the heirs of his testator.<sup>2</sup>

§ 161. **Duration of Restraints on assertion of Adverse Claims.**—The duration of the restraint upon the acquisition and assertion of a paramount adverse title is coëxtensive with the existence in fact of the relations of cotenancy. It can neither precede the cotenancy nor continue after the community of interest has ceased. Nor can the creation of a cotenancy have any retroactive effect upon the rights of any of the parties. No breach of fidelity or good faith can be presumed from a purchase before the cotenancy commenced. Therefore, if a man having a title to land, thereafter, in conjunction with others, acquires another claim of title, this acquisition does not impose any obligation on him not to assert his former title, nor does it confer on his cotenants any right to participate in the former title on any other terms than he chooses to enforce.<sup>3</sup> So the termination of the cotenancy generally releases the parties from any restraint imposed by it. An exception to this rule exists whenever the former cotenant is bound by a warranty of title, express or implied. Hence, where partition is made, "as the law makes each partitioner the warrantor of the others, to the extent of the portion allotted to him, whether there be an express warranty in the deed or not, and as no principle is better settled at common law than that a warrantor is barred or estopped to claim against his own warranty, it seems clearly to follow that no party to a partition can be permitted to assert an adverse title for the purpose of ousting another party from his portion, allotted to him by the same partition,

<sup>1</sup> *Rothwell v. Dewees*, 2 Black U. S. 618; *Lee v. Fox*, 6 Dana, 176; *Young v. Adams*, 14 B. Monr. 127.

<sup>2</sup> *Alexander v. Kennedy*, 8 Grant's Ca. 380.

<sup>3</sup> *Sneed's Heirs v. Atherton*, 6 Dana, 279.

though there be no express warranty in the deed.”<sup>1</sup> Where cotenants became antagonistic to each other in their claims and interests, and a sale of their joint interests was made by virtue of an order of Court, it was held that there remained no duty or obligation on the part of either of them not to acquire an outstanding mortgage, and that such mortgage, though obtained at a large discount, could be enforced for the full amount due upon it.<sup>2</sup>

§ 162. **After Eviction the Privity between the Parties is Destroyed.**—“They are no longer tenants in common of that land, because it is taken by a paramount claim; and for the same reason, neither of them has any longer a joint or separate interest in it. It belongs to another, and is taken from their common stock into the possession of that other. Where there is no common interest, the privity, and all consequences following from it, necessarily cease.”<sup>3</sup> A purchase of this paramount title made after the eviction “does not affect any common interest, nor create any common right or advantage.” Such purchase, therefore, is held free from any trust in favor of the purchaser’s late cotenant. And where one cotenant has ousted the other, by an entry on the land, claiming and exercising the rights of an owner in severalty, he may buy in a distinct adverse title, and assert it to protect and retain his possession against his cotenant.<sup>4</sup>

§ 163. **Whether must have Title to impose Restraints.**—A question has been raised whether, in order to estop a party from acquiring an adverse claim, he must not be tenant in common of *some title*. In some cases where two or more have purchased from one whom they supposed to have title, and it turned out that he had none whatsoever, it has been determined that each was at liberty to obtain the whole tract from the true owner. “The bare fact that each had been cheated, neither gave any right to the other, or deprived him of the full and absolute right to purchase from the real owner, when

<sup>1</sup> Venable v. Beauchamp, 3 Dana, 326.

<sup>2</sup> Wells v. Chapman, 4 Sandf. Ch. 341, See also Reinboth v. Zerbe Run Improvement Co., 29 Pa. St. 145.

<sup>3</sup> Coleman v. Coleman, 3 Dana, 403.

<sup>4</sup> Larman v. Huey’s Heirs, 13 B. Monr. 448; Gillaspie v. Osburn, 3 A. K. Marsh. 78.

discovered.”<sup>1</sup> The cases which approve this language involved a determination of the rights of persons who had made purchases from a claimant, believing him to have title. The lands purchased seem to have been vacant public lands. The interest acquired under the deed was neither possession nor the right to the possession. It was properly described in one of the cases as “mere moonshine;” and in each case it was adjudged to have no force to prevent either party from obtaining title in his own name and for his own use from the Government. These cases were probably determined correctly. But it is manifest that the principles enounced in them should be confined to identical cases. There may be no valid objection to permitting a person to acquire for his own use vacant lands owned by State or Federal Government, notwithstanding he may have before been so unfortunate as to be concerned in a joint purchase from one having no title. But to say generally that co-grantees are not liable to the restraints imposed on cotenants merely because they obtained no title, would be to except out of the general rule those cases in which equitable considerations most imperatively demand its enforcement. No doubt in these, as in all other cases, the test to be applied is to consider the actual relations of the parties rather than their nominal relations. If, notwithstanding the fact that they are named as co-grantees in a deed, they acquired nothing from their purchase, and either never exercised the rights of joint owners, or have ceased to consider themselves within the relation of cotenancy on account of their failure of title, then both should be free to deal with the subject matter of their former purchase. If, on the contrary, though they have no title, the parties continue to regard each other as cotenants, and if, on that account, they are apparently sustaining toward each other relations of trust and confidence, then neither should be at liberty to act in hostility to the interests of the other. If a distinction is to be taken in regard to the restraints imposed on cotenants, based upon the difference between *want of title* and *defective title*, then a very embarrassing question must frequently arise as to the point where a defective title becomes so defective that it may be regarded as “mere

<sup>1</sup> Smiley v. Dixon, 1 Penrose & Watts, 440; Roberts v. Thorn, 25 Tex. 736.

moonshine." Whenever an outstanding title is paramount to that of the cotenants, then their title, though some may term it *defective* only, is in fact *no title*. To hold that cotenants are bound only when they have *title* is therefore holding that they are free, except when neither can injure the other.

§ 164. **No Restraints on Cotenants Contracting with one another.**—The cotenants are at liberty to contract with one another, in relation to all matters, including the subject matter of the tenancy. One may lease his moiety to the other; and upon such leasing, the parties bear to each other the relations, are subject to the obligations, and entitled to the rights, of landlord and tenant. The cotenant leasing has the right to distrain for rent due on the lease.<sup>1</sup> "Joint-tenants may make a subdivision of time of their respective occupancy of the property held in joint-tenancy, and if an injury is committed upon the joint right, while it is held in the exclusive possession of one of the joint-tenants, under the subdivision, trespass may be sustained by the exclusive possessor for the time being."<sup>2</sup>

§ 165. **Either may buy interest of other at Forced Sale.**—The reasons which prevent a cotenant from purchasing and asserting an outstanding title, do not apply with equal, and generally not with any, force against his purchasing the title of his cotenants, whether the sale be voluntary or involuntary. Unless some fraud can be shown to have been perpetrated, or some superior knowledge taken advantage of, there is no doubt that a cotenant may purchase at an execution or judicial sale the moiety of any of his companions in interest, and that he may retain and assert the title thereby acquired, as fully as though he were a stranger to the judgment defendant.<sup>3</sup> But it seems to be assumed in Pennsylvania, that if a judgment be against all the cotenants for a joint debt, neither of them can acquire any title against the others by bidding in their joint property at the execution sale; and that the sheriff's deed, though regularly issued, can only give a title

<sup>1</sup> Cowper v. Fletcher, 6 Best & S. 470; 1 Platt Leases, 131; Snelgar v. Henston, Cro. Jac. 611; Story v. Johnson, 2 Yo. & Col. Exch. 586.

<sup>2</sup> Curtis v. Swearingen, Breese, 160.

<sup>3</sup> Gunter v. Laffan, 7 Cal. 588; Brittin v. Handy, 20 Ark. 404.

in trust for the cotenants to the extent of their shares before the sale.<sup>1</sup>

ACTS PRESUMED TO BE IN SUPPORT OF COMMON TITLE.

§ 166. **Acts of one presumed to be for Benefit of all.**—All acts done by a cotenant and relating to or affecting the common property, are presumed to have been done by him for the common benefit of himself and the others. The relation between him and the other owners is always supposed to be amicable rather than hostile; and his acts are therefore regarded as being in subordination to the title of all the tenants, for by so regarding them they may be made to promote the interests of all.<sup>2</sup> Therefore, as a general proposition, the entry of one cotenant enures to the benefit of all.<sup>3</sup> “But this proposition is based upon the supposition that the entry is made either *eo nomine*, as cotenants, or that it is silently made, without any avowal in regard to it, or without notice to a cotenant that it is adverse.”<sup>4</sup> “As both have an equal right to the possession, the law presumes that if one only enters, and takes the rents and profits, he does this act as well for his companion as for himself. But this presumption may be rebutted by the overt acts of the one so entering: by such acts as show that he means to hold exclusively for himself, without being accountable to any one.”<sup>5</sup> “The possession or entry of one tenant in common, or joint-tenant, is always presumed to be in maintenance of the right of all; and he shall not be presumed to intend a wrong to his companions, if his acts will admit of any other construction.”<sup>6</sup> And where the entry was made upon the common property, as a tenant in common, the subsequent exclusive receipt and retention of the rents and profits were not deemed sufficient to rebut the presumption that the possession was held in

<sup>1</sup> Gibson v. Winslow, 46 Pa. St. 384.

<sup>2</sup> Baker v. Whiting, 8 Sumn. 485.

<sup>3</sup> Ford v. Gray, Salk. 285; Smales v. Dale, Hob. 120; Doe v. Keen, 7 T. R. 386; Gilkey v. Peeler, 22 Tex. 663; Knox v. Silloway, 1 Fairf. 201; Young v. Adams, 14 B. Monr. 127; Villard v. Robert, 1 Strob. Eq. 393; Van Valkenburgh v. Huff, 1 Nev. 142.

<sup>4</sup> Gill v. Fauntleroy, 8 B. Monr. 188; Manchester v. Doddridge, 3 Ind. 360; Clymer v. Dawkins, 8 How. U. S. 689.

<sup>5</sup> Bryan v. Atwater, 5 Day, 191; Buckmaster v. Needham, 22 Vt. 617.

<sup>6</sup> Stearns on Real Actions, 41.



support of the common title.<sup>1</sup> “It is clear, where there is no visible adverse possession of a part of a tract, an entry by any cotenants on the tract gives a seizin of the whole, according to their titles; because the tract is not severed or divided by any visible bounds, or inclosure, or adverse seizin; and the entry must inure as a seizin of all the cotenants, and for their benefit.”<sup>2</sup>

§ 167. **Possession of one when presumed to be Possession of all.**—The entry of one cotenant, as we have shown, is, in the absence of clear proof to the contrary, construed as conferring seizin upon all. And, supported by the same reasons, and prevailing to the same extent, is the rule that the continuing possession of a cotenant, whether the entry was made by himself alone or in connection with his companions, is the possession of all the cotenants.<sup>3</sup> This rule prevails not merely in behalf of those who were cotenants when the entry was made: its benefits extend to all who afterwards acquire undivided interests in the property. Thus, if A and B together own personal property of which A is in actual possession, and B sell his moiety to C, the possession of A immediately becomes the possession of C also. Therefore, being at once, by presumption and construction of law, put in possession as tenant in common with A, it is not necessary that C should take actual possession with A, to make his purchase good under the Statute of Frauds, as against the creditors of B. If A, the cotenant in possession, had sold his interest, then the sale should have been followed by an actual change of possession, because there was no cotenant whose *actual* possession could have operated for the benefit of A's vendee.<sup>4</sup> The possession of one cotenant has been held to be the constructive possession of his companion, even when the latter had been removed from the premises by the sheriff, acting by authority of a

<sup>1</sup> Thornton v. York Bank, 45 Me. 162; Parker v. The Proprietors, 8 Met. 99; Allen v. Hall, 1 McCord, 131.

<sup>2</sup> Thomas v. Hatch, 3 Sumn. 181; Cunningham v. Roberson, 1 Swan, 188; Chitty on Descents, 57.

<sup>3</sup> Strong v. Colter, 18 Minn. 82; Bogard v. Jones, 9 Humph. 739; Waring v. Crow. 11 Cal. 366; Colman v. Clements, 23 Cal. 245.

<sup>4</sup> Brown v. Graham, 24 Ill. 630.



writ of possession issued upon a judgment against the party removed.<sup>1</sup> But it seems that there may be an entry made, and possession thereunder held by a tenant in common, without conferring any seizin upon his cotenants. Thus, where G was in possession of land claiming title thereto under a deed from H, and by several judgments against him three-fourths of the land was recovered from G, and entry was made under these judgments, but nothing took place to disturb the actual seizin of G, the Court held that the entries made by the cotenants who sued for and recovered their several moieties, did not enure to the benefit of the other cotenant.<sup>2</sup> On the other hand, it is insisted that if the possession of one of the cotenants operates for the benefit of all, it follows that neither of them can be disseized by a stranger to the title, who recognizes the rights and respects the possession of the others. "The possession of the other tenants in common, held for the benefit of all, would seem to defeat any attempt to create an adverse seizin, as against one."<sup>3</sup> If a person enter upon lands, and acquire possession thereof adverse to the true title, and afterwards recognizes the title of part of the owners, and abandons his adverse holding as against them, this abandonment revests the seizin in all the rightful co-owners, including the cotenants whose rights were not directly recognized by the disseizor.<sup>4</sup>

ACTS AND RESTRAINTS OF ONE COTENANT AFFECTING THE OTHERS.

§ 168. **No Estoppel against one affects the other.**—As a general rule, no estoppel created against either of the cotenants can prejudice the rights of the others.<sup>5</sup> If one cotenant bring an action in regard to his own moiety, the judgment rendered in such action cannot result in any diminution of the rights of the others. Because the judgment is thus powerless to operate upon the interest of the cotenant who is not a party to the action, it follows that he is not precluded

<sup>1</sup> Bernecker v. Miller, 40 Mo. 474.

<sup>2</sup> Gilman v. Stetson, 18 Me. 431.

<sup>3</sup> Farrar v. Eastman, 10 Me. 195; Reading v. Royston 2 Salk. 423; Vaughan v. Bacon, 15 Me. 455.

<sup>4</sup> Vaughan v. Bacon, 15 Me. 457.

<sup>5</sup> Walker v. Perryman, 23 Ga. 314.

from testifying therein as a witness on behalf of his companion.<sup>1</sup> A case quite recently decided by the Supreme Court of California, furnishes a strong illustration of the entire freedom of every tenant in common from adjudications to which he is neither a party nor a privy. W. H. & H. were sued in an action of trespass *quare clausum fregit* for excavating a tract of which they each owned an undivided one-fourth. From some cause, a judgment on the merits was rendered against them, which, in effect, forever precluded them from asserting their title. Subsequently S, the tenant in common of the remaining undivided one-fourth, brought his action of ejectment against the plaintiff in the former suit, seeking to recover possession of the entire tract. Having succeeded in establishing, to the satisfaction of the Court, his title to the undivided one-fourth, S claimed that his right to recover the whole tract was in no manner impaired by the adjudication against his cotenants. In conceding and enforcing this claim the Court said: "The plaintiff deraigns his title to one undivided fourth of the premises in controversy under a valid Alcalde grant, and is entitled to recover possession of the whole property as against the defendant, who has shown no title, unless the judgment in the case of *Sutton v. Woods et al.* shall have the effect to limit the recovery to the one undivided fourth only. Neither plaintiff nor his grantors were parties to that action, or in privity with the defendants therein; and it is conceded that *his* rights are unaffected by the judgment. But it is said Woods, Hastings & Haskell, the defendants in the former action, who were then cotenants in common with plaintiff's grantors, are concluded by the judgment, and are estopped thereby from setting up title or a right to the possession, as against the present defendant, who was the plaintiff in that action; and hence that the present plaintiff is not entitled to recover the possession of the three-fourths formerly claimed by them, and to which it is argued the defendant has the better title, as against Woods, Hastings & Haskell. But one of the incidents of a tenancy in common holding the title is, that each of the cotenants is entitled to the exclusive possession of the entire property, as against the

<sup>1</sup> *Bennett v. Hethington*, 16 Serg. & R. 195; *Hammett v. Blount*, 1 Swan, 385.

whole world, except his cotenants. As between tenants in common and a trespasser, each tenant in common is better entitled to possession than a wrongdoer. The former is seized *per mi et per tout*, and has an interest in the whole, which entitles him to the enjoyment of the entire estate, as against every one except his cotenants. Is the defendant a cotenant with the plaintiff? If so, he must have acquired that *status* by means of the judgment in the former action, in which it was adjudged, as between him and Woods, Hastings & Haskell, he had the better right to the possession. But he did not thereby become vested with their title, or succeed to their interest in the property. The judgment added nothing to his former title, but left it as it was before; and the point decided was that his was better than the title of his adversaries. I do not comprehend how all this can have the effect to convert the defendant into a tenant in common with the plaintiff's grantors, who were not parties to the action, and were unaffected by the judgment. Notwithstanding the judgment, the defendant, so far as it concerns the plaintiff and his rights, is as much a trespasser now as when he first entered on the lot; and I am not aware of any exception to the rule that as against a trespasser one of several tenants in common is entitled to the possession of the entire property. The judgment, it is true, estops Woods, Hastings & Haskell from asserting title as against the defendant. But they are not asserting it in this action; nor are their rights in question here. On the contrary, plaintiff is entitled to the possession of the whole property, not on the strength of their title or right to the possession, but of his own, as one of several tenants in common, having a better right as such to the entire property than a mere intruder without title. Nor can it be doubtful that the plaintiff and Woods, Hastings & Haskell are still tenants in common notwithstanding the judgment in the former action. The only effect of the judgment was to estop the defendants therein from asserting the title which they claimed against Sutton, the present defendant; and the Court did not attempt to interfere with the relation of a tenancy in common then existing between them and the plaintiff's grantors. No question of that kind was before the Court, and of course it had no power to deal with it, if it

had attempted to do so. As between the several tenants in common, their relations toward each other were therefore wholly unaffected by the judgment.”<sup>1</sup>

§ 169. **Admission made by one Cotenant.**—The general rule of law seems to be established, though not without doubt and dissension, that, when two or more are jointly interested, an admission made by one is binding upon all.<sup>2</sup> The general impression prevails that joint-tenants form no exception to this rule. This impression, while it does not appear to be founded upon any direct adjudication, is manifest from a number of decisions in which the question was incidentally considered.<sup>3</sup> On the other hand, we have the excellent authority of Lord Coke, that a lease accepted by a joint-tenant cannot bind his cotenant: “If one joyntenant in fee take a lease for yeares of an estranger by deed indented and dyeth, the survivour shall not be bound by the conclusion, because he claymes above it, and not under it.”<sup>4</sup> Whatever the law upon this subject may be when the interest is *joint*, no doubt exists that a mere community of interest never enables one of the parties to bind the others by any admission in reference to the common subject of ownership. Thus, where an attempt was made to introduce in evidence the admission of a tenant in common, for the purpose of prejudicing the interests of his companions, the Court said: “Although this admission might have been sufficient to conclude him, if he had been the only plaintiff, it ought not to affect the interest of the other plaintiffs who claim as tenants in common with him. If an ejectment is brought by tenants in common, the plaintiff may give in evidence the separate titles of the several lessors to separate parts of the premises, and recover accordingly. But it would seem an unjust rule which would suffer one tenant in common to admit away the rights of others. As far as I have been able to discover, an

<sup>1</sup> Williams v. Sutton, 43 Cal. 71.

<sup>2</sup> Greenl. Ev. sec. 174; 1 Ch. Ev. 75; 2 Stark Ev. 25; Whitcomb v. Whiting, 2 Doug. K. B. 652.

<sup>3</sup> Bernard v. Walker, 2 Upper Canada E. & A. Rep. 146; Lucas v. Delacour, 1 M. & Sel. 249; Crosse v. Bedinfield, 12 Sim. 35; Kemble v. Farren, 3 Car. & P. 623; Dietrich v. Dietrich, 4 Watts, 167.

<sup>4</sup> Co. Litt. 185 a.

admission by a party to the record is evidence against him who makes it—and where there are partners, against them also—but not against others who happen to be joined as partners to the suit.”<sup>1</sup> Where a deed made to two was claimed to have been intended and accepted as a mortgage, it was sought to establish the character of the deed as a security, by introducing in evidence the admission of one of the grantees. “Holding them to be tenants in common,” said the Judge, in deciding this question, “I do not find that the admission of one would, on general principles, be binding on the other; on the contrary, it has been held that such an admission would not be binding against the cotenant in common, though both are parties on the same side of the suit. As a general rule, indeed, such an admission of one cotenant should not be binding on the other; for, admitting, in this case, the truth to be that the deed was really intended by all parties to be an absolute conveyance, as it imports, it would be hard and unjust that the owner of a several interest held under it should have that interest cut down to a security only, because the owner of the other moiety had chosen for any purpose to deny that the intention was such as the deed expressed.”<sup>2</sup> Joint-devisees under a will, like tenants in common, are not affected by an admission made by either concerning the validity of the will. Devisees sometimes stand upon a different footing from cotenants in common. The interests of the former are generally more unequal than those of the latter. “We therefore at once feel the justice of the rule which protects a legatee who has thousands involved in the question from being prejudiced by the admissions of one who has but a shilling.”<sup>3</sup> Whenever the Courts have assigned their reasons for deciding that the admission of one cotenant in common should not bind the other, the chief of these reasons has always been the manifest injustice of allowing one owner to be deprived of his property by the declarations of a co-owner. Now, this injustice is as manifest and as una-

<sup>1</sup> *Dan v. Brown*, 4 Cow. 492; *McClellan v. Cox*, 36 Me. 101; *Caldwell v. Anger*, 4 Minn. 223; 1 Greenl. Ev. sec. 176; *Jaggers v. Binnings*, 1 Stark. Rep. 64.

<sup>2</sup> *Bernard v. Walker*, 2 Upper Canada E. & App. 146.

<sup>3</sup> *Dietrich v. Dietrich*, 4 Watts, 167; *Hauberger v. Root*, 6 Watts & S. 487; *Bovard v. Wallace*, 4 Serg. & R. 499; *Nussear v. Arnold*, 13 Serg. & R. 323.

voidable where the interest is joint as where it is several. A joint-tenant has no greater control over his companions than a tenant in common has over his. Why, then, should one suffer any greater detriment than the other by the act or admission of his cotenant?

§ 170. **Representations made by a tenant in common** stand upon the same ground, and are controlled by the same rules of law, as his admissions. They can create no estoppel, nor furnish a basis of any claim against the other cotenants in common. The objection to binding one by the representations of another is, that this cannot be done without doing an injury to him who has not participated in the representations, and making him responsible for the default of one over whom he can exercise no control.<sup>1</sup> This objection is undoubtedly as unanswerable and as unavoidable, in the case of joint-tenants as in that of tenants in common.

§ 171. **Notice to One.**—If notice to one part owner ever operates as notice to another, it is rarely by reason of their relation as cotenants. Unless one has been made the agent of the other, by virtue of partnership relations, or of some other means, neither can ordinarily be charged and held accountable for the knowledge of the other. If an incumbrance or conveyance be in existence affecting the title to land, and a purchase be made by several jointly, or as tenants in common, those who have notice of the incumbrance or conveyance will hold their title in subordination to it, while those who did not have such notice, will obtain their title free from the claim to which their cotenants are subjected.<sup>2</sup> The rule that notice to a cotenant is not, by mere force of the relation of cotenancy, notice to any of his companions, unless in case of notices to quit, seems to prevail without any qualifications or exceptions. An estate was conveyed to a husband and wife, her property forming the consideration of the conveyance. There was then in existence a mortgage on the land, of which the husband alone had notice. This mortgage was subsequently foreclosed by “a regular statute foreclosure.” Afterwards, a

<sup>1</sup> *The Dexter Lime Rock Co. v. Dexter*, 6 R. I. 873.

<sup>2</sup> *Wiswall v. McGown*, Hoffm. Ch. 125; *S. C. 2 Barb. 270*; *Parker v. Kane*, 4 Wis. 1.

contest was carried on between the wife, who claimed the land as surviving tenant by entirety, and S, who claimed as grantee under the purchaser at the foreclosure sale. The Court by which this contest was ultimately determined could not see how the wife could be affected "by the notice which her husband had of the unregistered mortgage." Her claim was neither by, through, nor under her husband, nor could she be charged with his notice by reason of being his wife. If chargeable at all, then, it must have been on account of being grantee in a deed with one who had notice. But upon this point the opinion of the Court, as stated by Judge Bronson, was as follows: "On a conveyance to two or more persons, whatever may be the nature of their estate, I am not prepared to admit that notice to *one* would be sufficient to overcome the registry laws as to *all* the purchasers. We have not been referred to any authority in support of such a position, nor has any fallen under my observation. It is easy to see why the estate of the fraudulent vendee should fail, but it is difficult to understand upon what principle the other and innocent vendee can also be punished for his transgression."<sup>1</sup>

§ 172. **One not Prejudiced by Act of Another.**—Except where limitations and restraints are imposed by law on account of the mutual trust and confidence arising out of the relation of cotenancy, each of the parties may act for himself in regard to his own moiety; and as to such moiety, has all the powers of management and disposition incident to ownership in severalty. Nor can his powers in this respect be impaired, or his rights diminished, by any act of his companions. Hence, if a survey or location be made by several of the cotenants, and thereafter recognized by them as embracing the true location and extent of the lands in which they are interested, this cannot prejudice the rights of the other cotenants. It is never in the power of *some* "to affect by their action or disclaimers the rights of other claimants. No action of a portion of several tenants in common can impair the rights of their cotenants."<sup>2</sup> The act of a part owner in locating his land under a deed, is in nowise binding on his

<sup>1</sup> Snyder v. Sponable, 1 Hill, 569.

<sup>2</sup> Mahoney v. Van Winkle, 21 Cal. 582.



co-owners, unless ratified or authorized by them.<sup>1</sup> The same rule applies to contracts made in regard to the common property. Neither cotenant can enlarge, vary, or renew the contract, or continue it in force after a forfeiture has been incurred. A note was given for the amount of the price agreed to be paid for certain land. On payment of this note, a conveyance of the land was to be made. When the note became due, payment thereof was demanded, and the demand was accompanied by the tender of a deed. The maker of the note declared himself unable to make payment, and stated that he would have to give up his contract. Some three years later, payment of the note was tendered to one of the part owners, who refused to accept it. The tender was then made to, and the money accepted by, the other owner. This acceptance was held to be binding on him who received it; and the purchaser's bill for specific performance was dismissed as to the cotenant who had refused to waive the forfeiture.<sup>2</sup>

§ 173. **When Cotenant affected by Refusal of his Companion to Act.**—While no act of a cotenant, unless authorized or ratified, can ordinarily have any effect against his companions, a refusal to act may sometimes affect those who do not participate in nor sanction the refusal. Thus, if the cotenants are jointly bound to make a conveyance, and, upon demand, one of them refuses to do so, a good cause of action at once arises against *all* bound by the agreement. The reason of this is, that the party demanding has a right to a conveyance of the *whole* title. If one of the parties positively refuses, the rights of the beneficiary under the contract can only be enforced by suit. Therefore, he is excused from making any further demand, since no act on the part of the others could avert the necessity of a proceeding against them in connection with their cotenant, who, on his part, declines to fulfil the joint engagement.<sup>3</sup>

§ 174. **Bound by Beneficial Acts.**—"Every act done by one joint-tenant which is for the benefit of his companions will bind them; but those acts which prejudice his com-

<sup>1</sup> Jackson v. Moore, 6 Cow. 723.

<sup>2</sup> Pearis v. Covillaud, 6 Cal. 620.

<sup>3</sup> Blood v. Goodrich, 9 Wend. 79.



panions in estate will not bind them; and if the benefit be doubtful, two joint-tenants have no right to elect for a third."<sup>1</sup> The general proposition of law, as above quoted, is well sustained by the common law authorities. But it is evident that many distressing questions may arise as to what acts are necessarily presumed to be so beneficial as to authorize either joint-tenant to bind the others. Upon this subject, the reports furnish no rules of general application. They, however, contain adjudications in a variety of cases, by which cotenants were held to be affected by acts of their companions. It is doubtful whether these adjudications can be referred to any one general principle. Some of them proceed upon the theory that the act was binding because for the common benefit; others, upon the theory that for certain purposes, and under certain circumstances, one cotenant has necessarily the right to act on behalf of the others; and still other cases proceed upon the assumption that, in certain instances, cotenants or co-obligees may be treated in law as one person; and that a payment to, or a release by, one must therefore be regarded as a satisfaction to all. One of the instances in which an act sanctioned by less than the whole number has been considered the act of all, because presumed to be beneficial to all, is distraining for rent. Whenever two or more claim by one and the same title, whether as joint-tenants, parceners by common law, or parceners by custom, either of them may distrain for the rent due to all.<sup>2</sup> This rule does not appear to be dependent upon any presumption that one is, for this purpose, the agent of the other; for it prevails, notwithstanding the conceded fact that one of the cotenants refused to sanction the distress.<sup>3</sup>

§ 175. **Acts to Preserve Common Property.**—It has been determined, where property owned by several as tenants in common, was in such imminent peril that some active measures were essential to its protection, that one of the part owners present on the ground at the point of danger, "had the right

<sup>1</sup> Addison on Contracts, 334.

<sup>2</sup> Leigh v. Shepherd, 5 Moore, 297; 2 Bro. & B. 465; Robinson v. Hofman, 4 Bing. 562; Pullen v. Palmer, 5 Mod. 72; Page v. Stedman, Carth. 364.

<sup>3</sup> Robinson v. Hofman, 6 L. J. Rep. C. P. 113; 4 Bing. 562; 3 Car. & P. 234.

to adopt such means for its protection from injuries by the flood as the exigencies of the time seemed to require." Therefore, any person who acted in such circumstances under directions from one of the cotenants, in an attempt to preserve the property, "ought not to be, and cannot on any just principle be, rendered liable in damages for the injuries that followed."<sup>1</sup>

§ 176. **Redemption of Lands.**—One of the acts that either part owner may do, without special authority from the others, is to redeem the whole property from a prior sale made *in solido* for the gross amount of taxes due thereon.<sup>2</sup> While the other cotenants may participate in the benefit of the redemption, the act of their companion is not binding on them so far as to impose upon them a personal obligation to reimburse him for their proportion of the amount necessarily expended in effecting the redemption. The amount thus expended may, no doubt, be asserted as a lien against the joint property. But beyond this, the cotenant has no means of enforcing contribution; because the other cotenants had the right to abandon their interest in the lands, and to forfeit all claims to it, by non-payment of the tax liens against it.<sup>3</sup> But in California, under a statute permitting a minor to make his redemption within six months after attaining his majority, it has been decided that such minor had no right to redeem beyond the extent of his own interest, when he was tenant in common with others who were not under any disability, but had permitted their time for redeeming to expire.<sup>4</sup> The general rule is that, "If the equity of redemption be the property of several persons as joint-tenants, or tenants in common, one of them may redeem; each as against an incumbrance, and subject to account with his cotenant, being entitled to possession and receipt of the whole of the rents."<sup>5</sup> "But it seems one cannot redeem his moiety only; for this would be directly contrary to the principle that a mortgage is to be redeemed entirely, or not at all."<sup>6</sup>

<sup>1</sup> *Orary v. Campbell*, 24 Cal. 637.

<sup>2</sup> *Loomis v. Pingree*, 43 Me. 299; *Halsey v. Blood*, 29 Pa. St. 322.

<sup>3</sup> *Watkins v. Eaton*, 30 Me. 584.

<sup>4</sup> *Quinn v. Kenney*, Oct. Term, 1873. See also *Kirkham v. Dupont*, 14 Cal. 559.

<sup>5</sup> *Fisher on Morts.* 526; *Waugh v. Land*, G. Coop. 130; *Wynne v. Styan*, 2 Ph. 306.

<sup>6</sup> *Fisher on Morts.* 526.

§ 177. **Authority of one to receive Payment of Rent.**—In a case which came before Lord Kenyon, involving the determination of the question whether the lessee of several tenants in common might pay the whole rent to one, after notice requiring him not to do so, his Lordship said: “In order to maintain plaintiff’s case, it was necessary for him to prove that a *terre* tenant may pay the whole rent to one tenant in common, not only without the concurrence of both, but contrary to express notice of the other. But no case, no resolution in the books, has been cited to warrant such a position, and all the analogous cases are the other way. Therefore, the justice of the case, and the argument of analogous cases, being with the avowant, and the payment having been made after notice and against conscience, I am of opinion that the avowant is entitled to judgment.”<sup>1</sup> This case upheld the right of a tenant in common to distrain for his moiety of the rent after it had, contrary to his expressed wish, been paid to a cotenant. So far as we can ascertain, this opinion of Lord Kenyon’s has never been directly called in question. In fact, no precisely similar case seems to have either before or since found its way into the reports. But in the absence of express notice not to do so, it seems clear that a lessee holding under a joint lease may pay the whole of the rent to either of his lessors, and that such payment will be a full discharge of the claims of each and all of such lessors, by whatever cotenancy their title may be held.<sup>2</sup>

§ 178. **Authority to receive Payment of Joint Demand.**—As between bankers and their customers, the rule of law is, that if a deposit be made by two or more jointly, the bank is not authorized to allow a withdrawal of any part thereof, without the joint order of the depositors.<sup>3</sup> With this exception, a debt, demand, or other personal obligation due jointly to two or more persons may be released by payment to

<sup>1</sup> *Harrison v. Barnby*, 5 T. R. 249.

<sup>2</sup> *Decker v. Johnson*, 15 Johns. 481; *Sherman v. Ballou*, 8 Cow. 308; *Grossman v. Lauber*, 29 Ind. 621; *Griffin v. Clark*, 83 Barb. 46. As to joint-tenants, see *Robinson v. Hoffman*, 4 Bing. 562; 3 Car. & P. 234; 1 Moore & P. 474; *Husband v. Davis*, 10 Com. B. 645; *Webb v. Ledsam*, 19 Jur. 775; 1 Kay & J. 385.

<sup>3</sup> *Innes v. Stephenson*, 1 Moody & R. 145.

either.<sup>1</sup> It may also be discharged by an accord and satisfaction with one of the joint payees, by which he has accepted part payment in coin, and allowed a set-off against himself for the balance. Upon the death of a joint payee, the entire debt survives to the other. If payment to one were not a discharge of the entire debt, then it might happen that he who had received the debt might, by virtue of his right as survivor, recover the *whole* again. If the debt is secured by a mortgage, either of the mortgagees may receive payment, and discharge the whole lien.<sup>2</sup> “So far as the mortgagor is concerned, all the mortgagees are to be regarded as one person, and he has a right to deal with each as representing all. By accepting a joint mortgage, each mortgagee gives to every other the power which this principle implies, as each member of a copartnership clothes each of his copartners with power to bind him in all matters within the scope of their joint business. Except for the purpose of receiving payment and acknowledging satisfaction, the powers of an ordinary joint obligee over the obligation would not probably correspond with those of a partner; but to that extent, they must be identical, otherwise the obligor could never safely pay to one of the several obligees. The certificate of one mortgagee, therefore, was sufficient to entitle the mortgagor to a discharge of his mortgage on the record.”<sup>3</sup>

§ 179. **Release.**—The general rule, sanctioned at least by all the early and most of the late authorities, is that whenever the cause of action existing in favor of any number of cotenants is joint, the release by one bars an action by the others.<sup>4</sup> And it seems that in all personal actions “tenants in common may have such actions personal jointly in all their names, as of trespass, or of offences which concern their tenements in common, as for breaking their houses, breaking their closes,

<sup>1</sup> *Wallace v. Kelsall*, 7 Mees. & W. 264; *Husband v. Davis*, 10 Com. B. 645; *Jones v. Yates*, 9 Barn. & C. 582; *Fitch v. Forman*, 14 Johns. 174; *Pierson v. Hooker*, 3 Johns. 68; 2 Cowen's Treatise, 2d ed. 772; *Bulkley v. Dayton*, 14 Johns. 387.

<sup>2</sup> *The People v. Keyser*, 28 N. Y. 228; *Bowes v. Seeger*, 8 Watts & S. 222.

<sup>3</sup> *Selden, J.* in *The People v. Keyser*, 28 N. Y. 235.

<sup>4</sup> *Ruddock's Case*, 6 Co. 25 a; *Razing v. Ruddock* Cro. Eliz. 648; *Pierson v. Hooker*, 3 Johns. 70.

feeding, wasting and defowling their grasse, cutting their woods, for fishing in their pischary, and such like. In this case, tenants in common shall have one action jointly, and shall recover jointly their damages, because the action is in the personalty and not in the realty."<sup>1</sup> Therefore, an action for trespass on their land, being strictly personal, may be barred by a release from either of the cotenants.<sup>2</sup> It is said the failure to interpose the release by way of plea in abatement, is of no consequence. "The right to release the action arises out of the right to control and discharge the ground of action. And if the cause of action may be released after action brought, it may be after it has arisen and before that time."<sup>3</sup> But, in another case, it is said that if the cotenant who has not released, commences a separate suit, the release is not available, unless pleaded in abatement.<sup>4</sup> A member of a proprietary cannot release a claim for damages, because the right of action never accrued to him but to the whole body. As he could not have sustained nor controlled any action, either by himself nor in conjunction with others, he cannot prejudice its maintenance by those who are entitled to sustain and control it.<sup>5</sup> But there are cases which seem to depart from the common law rule, in regard to a release given by a cotenant. Thus, in one case, an action was brought by two, to recover damages for the conversion of some steers of which they were tenants in common. One of the plaintiffs settled with the defendant and gave him a release. But the Court held that, "a settlement of the action by one tenant in common, without the consent of the other, will only enure as a settlement of the damages belonging to the party settling."<sup>6</sup> This decision was not made in the Court of last resort in the State in which it was pronounced; nor does it appear to be in harmony with either the later or the earlier decisions in the same State; but so far as it denies the right of a cotenant to release his companion's share of damages, it is supported by

<sup>1</sup> Litt. sec. 315.

<sup>2</sup> *Austin v. Hall*, 13 Johns. 286; *Kimball v. Boynton*, 22 Me. 291; *Kimball v. Wilson*, 3 N. H. 96.

<sup>3</sup> *Kimball v. Boynton*, 22 Me. 291.

<sup>4</sup> *Wilson v. Gamble*, 9 N. H. 75.

<sup>5</sup> *Allen v. Woodward*, 2 Foster, 544.

<sup>6</sup> *Gock v. Keneda*, 29 Barb. 122.

the principles laid down in the highest judicial tribunals of some of the other States.<sup>1</sup>

§ 180. **Giving Notice to Quit.**—In England, there seems to be but little doubt that in case of a joint lease by two or more cotenants, a notice to quit is effectual to terminate the tenancy though given by less than the whole number of the lessors. The reason of this rule was thus explained by Lord Tenterden: “Upon a joint demise by joint-tenants upon a tenancy from year to year, the true character of the tenancy is this, not that the tenant holds of each the share of each so long as he and each shall please, but that he holds the *whole* of *all* so long as he *and all* shall please; and as soon as any one of the joint-tenants gives a notice to quit, he effectually puts an end to *that* tenancy: the tenant has a right, upon such notice, to give up *the whole*, and unless he comes to a new arrangement with the other joint-tenants as to their shares, he is compellable so to do. The hardship upon the tenant, if he were not entitled to treat a notice from one as putting an end to the tenancy as to the whole, is obvious; for however willing a man might be to be sole tenant of an estate, it is not very likely he should be willing to hold undivided shares of it; and if, upon such a notice, the tenant is entitled to treat it as putting an end to the tenancy as a whole, the other joint-tenants must have the same right. It cannot be optional on one side, and on one side only.”<sup>2</sup> The case of *Right v. Cuthell*,<sup>3</sup> which may seem to sustain a different conclusion from that of Lord Tenterden, was apparently determined upon the peculiar phraseology of the lease. This lease contained a proviso that it might be terminated by either party upon notice in writing, under his *or their respective hands*. It was, therefore, held that a notice to quit, given by two out of three of the lessors, was insufficient, because it was not under the *hands of all*, as the lease contemplated it should be. The reasons urged for declaring a notice to quit effectual, though

<sup>1</sup> *Longfellow v. Quinsby*, 29 Me. 196; *Baker v. Jewell*, 6 Mass. 460; *Holland v. Weld*, 4 Greenl. 255.

<sup>2</sup> *Doe, d. Aslin v. Summersett*, 1 B. & Ad. 140; *Alford v. Vickery*, 1 Car. & M. 280; *Doe, d. Kindersley v. Hughes*, 7 Mees. & W. 141.

<sup>3</sup> 5 East, 491.

given by less than the whole number of the lessors, are as applicable to a joint demise made by tenants in common, as to such a demise when made by joint-tenants. The lessee, when one or more of his lessors, holding as tenants in common, gives a notice to quit, is no longer the lessee of all, and ought not to be required to hold a lease for a *moiety* when he originally contracted for *the whole*. The further question arises whether the lessee, though he cannot continue as lessee of the whole, should not be allowed to continue lessee of the moiety for which no notice had been given. "To hold that a notice to quit by one of several lessors must terminate the entire lease, might be a great hardship to the tenant, as it might compel him to give up what it would be for his interest to hold, and what he had not been called upon to surrender by the owner." The only American case, coming within our observation, which treats upon this subject, holds that a notice to quit, given by part of the lessors, cannot so terminate the entire tenancy as to enable *all* the lessors to maintain summary proceedings under the landlord and tenant act. It is also clear that the Court which determined this case was inclined to doubt the correctness of what we have stated to be the law in England, and to assert that, "if the lease by joint-tenants or tenants in common be in the usual form, it will be regarded as a demise by each of his own share only, and for aught we can see, must, upon authority, stand much upon the same footing as separate leases, so far, at least, as respects the question before us. If, on the other hand, the lease was to be regarded as a joint demise by all, then a notice by all would seem to be necessary to determine it, for it can hardly be concluded that a joint demise could be determined by a single lessor, unless so stipulated."<sup>1</sup> Whether a notice by one or more lessors shall or shall not be held to terminate the tenancy between the lessee and the lessor who did not join in giving or authorizing such notice, it is, in either event, clear that neither cotenant has, by virtue of the ordinary relations of cotenants, any authority to act as agent of his companions, in giving such notice. If the notice has any effect over the moieties of the owners who do

<sup>1</sup> Picard v. Perley, 45 N. H. 191.



not unite in it, this effect arises not from any presumed relation between the cotenant authorizing one to act as agent for the other, but from the nature of the leasing, and from the natural and reasonable presumption that the lessee never contemplated being a lessee of an undivided interest.

§ 181. **Receiving Notice to Quit.**—It has been held that a notice to quit, where there are two lessees, need not be served on but one of them;<sup>1</sup> and that such service is at least evidence that the notice reached the other lessee, though he lived elsewhere.<sup>2</sup> No case overruling or even doubting the correctness of this conclusion has come within our observation. Probably, no such cases exist. But if a notice to quit operates upon the rights of a lessee upon whom it was never served, then it must be admitted that an unjust and unreasonable exception has been established to the general rule, that notice to a cotenant is not notice to his companions.

§ 182. **Cotenants cannot Contract for each other.**—As a general rule, no cotenant has, by virtue of the relation of cotenancy, any authority to bind his companions in interest by any contract, whether relating to the joint property or otherwise. Therefore, neither can, in the absence of special authority so to do, make a valid leasing of the moiety of his companions.<sup>3</sup> And “we believe that there is no principle in law better settled than that one joint-tenant, or even partner, cannot bind a cotenant or copartner in a contract for the sale of real property, without an express authority before the contract is made, or a ratification of the contract afterwards.”<sup>4</sup> The same rule applies to any promise made by one of the cotenants on behalf of both;<sup>5</sup> nor is such promise rendered more binding on the one who did not assent to it by the fact that he was a copartner with his cotenant in a firm which, however, had been dissolved before the promise was made.<sup>6</sup>

<sup>1</sup> Doe, d. Macartney v. Crick, 5 Esp. 196.

<sup>2</sup> Doe, d. Bradford v. Watkins, 7 East, 551.

<sup>3</sup> Mussey v. Holt, 4 Foster, 254.

<sup>4</sup> Hanks v. Enloe, 33 Tex. 627.

<sup>5</sup> Brooks v. Harris, 12 Ala. 560; Merrill v. Berkshire, 11 Pick. 274.

<sup>6</sup> Lane v. Tyler, 49 Me. 252.



§ 183. **Transfer by one Cotenant.**—Neither of the cotenants has any authority, by virtue of the relation of cotenancy, to transfer, or, by any means, to dispose of the common property.<sup>1</sup> Of course, if there is anything sufficient to establish an implied or an express delegation of authority, the rule is different; for one cotenant is not precluded from acting as agent for his companion, when duly authorized. So the purpose for which the subject matter of ownership is acquired may be such as to necessarily create a presumption that one of the owners is empowered to dispose of the whole property. Therefore, when the whole title is claimed to have passed by a sale made by a part owner, testimony is always admissible to show that he had authority to act for his cotenant, or that, in the absence of such authorization, the latter has ratified the act. If the article was manufactured for sale, then there would arise a strong and perhaps a conclusive presumption in favor of a *bona fide* purchaser, that either part owner was empowered to sell the whole.<sup>2</sup> But where L and M, being owners as tenants in common of an oil-well, constructed a tank and filled it with their oil, agreeing that the oil should not be sold until \$5 per barrel could be procured for it, and L sold the whole for \$1 25 per barrel, it was held that the sale did not convey any legal or other title to the purchasers in excess of L's ownership.<sup>3</sup> Bills of exchange and promissory notes, made in favor of two or more persons, are subject to the general rule, and cannot be transferred by any less than the whole number of the payees.<sup>4</sup> If, at the making of the note or bill, the payees were partners, and each had, on that account, authority to make a transfer for the others, this authority is revoked by a subsequent dissolution of the copartnership. After such dissolution, all the late partners must unite in order to transfer title in severalty.<sup>5</sup>

<sup>1</sup> Carlyle v. Patterson, 3 Bibb, 95; Strickland v. Parker, 54 Me. 268.

<sup>2</sup> Oviatt v. Sage, 7 Conn. 99; Jackson v. Paxson, 25 Ga. 36.

<sup>3</sup> Mason v. Norris, 18 Grant Ch. 501.

<sup>4</sup> Story on Bills, sec. 197.

<sup>5</sup> Sanford v. Mickles, 4 Johns. 227; Sayre v. Frick, 7 Watts & S. 384; Robbins v. Fuller, 24 N. Y. 576.

§ 184. **Pledge by one Cotenant.**—A pledge of the common property made by one of the cotenants has no effect on the rights of the others, except to confer on the pledgee the right to retain possession to the extent of the pledgor's interest, and no further.<sup>1</sup> This is equally true, whether the pledge be made to secure the individual debt of him who makes it, or the joint debt of himself and his cotenants. Thus, where one of two cotenants of a leasehold interest made an assignment thereof to secure their joint debt, the Court referred to its former decision, that "one partner was not authorized to execute an assignment of the property of the firm, in the firm name, for the benefit of creditors, without consent of his copartner;" and from this former decision, was sure that "if a partner cannot execute an assignment of the assets of the firm, clearly a joint debtor cannot of the joint property."<sup>2</sup>

§ 185. **Cotenants cannot Create an Easement.**—As a tenant in common cannot make a grant of any specific part of the common land, which will convey any title against his cotenants, it follows that he cannot grant any right or easement upon any specified portion so as to confer any right capable of successful assertion against the other owners.<sup>3</sup> This rule is equally true whether an easement or right of way be claimed as a way of necessity, or as founded on an express grant. If a grantor convey lands from which it is necessary that the grantee shall have a right of way over other lands of the grantor, the law presumes that it was the intent of the parties that such right of way should be given, and the grantor will therefore be compelled to give it. But if the lands over which the right of way is claimed belong to others as cotenants with the grantor, they cannot be prejudiced by a presumed *intent* in which they did not participate.<sup>4</sup> And so where it is claimed that a highway has been dedicated by the acts of the owners, it must be shown that all of the cotenants participated or concurred in those acts.<sup>5</sup>

<sup>1</sup> Smith v. Clarke, 7 Wis. 563.

<sup>2</sup> Gates v. Andrews, 37 N. Y. 659.

<sup>3</sup> Washburn on Easements and Servitudes, ch. 1, sec. 8; Portmore v. Bunn, 3 Dowl. & B. 145; D. & S. Railway Co. v. Wawn, 8 Beav. 119.

<sup>4</sup> Collins v. Prentice, 15 Conn. 426.

<sup>5</sup> Scott v. State, 1 Sneed. 629.

§ 186. **May acquire Easement over Land held by one in Severalty.**—Cotenants may acquire by adverse user easement over lands held in severalty by one of their number. This has recently been determined by the Supreme Court of Errors of the State of Connecticut. The question was thought by the Court to be one “not discussed in the books.” The Judges considered it clear that such an easement may exist, and rested their conclusion on this reasoning: 1st, that if a way was appurtenant to an estate, it would not become extinct on the acquisition of the servient estate by one having a moiety of the dominant estate, but would remain unimpaired in favor of himself and his cotenants; 2d, that it was clear that an easement over A’s land in favor of A and B, cotenants of other lands, may be acquired by grant; and 3dly, if such an easement could exist, founded on a grant, it might be presumed from such user as “shall be evidence of a grant.”<sup>1</sup>

§ 187. **Easement not Extinguished by Owner being Cotenant of Servient Tract.**—Where the dominant tract of land is at one time owned by a person who is at the same time tenant in common in the servient tract, this ownership is not such a unity of title as extinguishes the right of way. “A unity of possession or right that extinguishes a prescriptive right must be such that the party should have an estate in the land *a qua* and in the land *in qua*, equal in duration, quality, and all other circumstances of right. The title to one undivided third part as tenant in common did not constitute such a unity, for it did not authorize him to set apart any portion for a private way for himself, as if he had been sole owner.”<sup>2</sup>

§ 188. **Agency and Ratification.**—One cotenant may act as agent for the others when authorized so to do. This authorization may be inferred from the acts of the parties, and need not be established by any express delegation of authority. Where one of the cotenants had, after the execution of a lease, always acted as the managing owner, and there were many circumstances tending to show that in so doing he was

<sup>1</sup> Bradley Fish Co. v. Dudley, 37 Conn. 144; Hickox v. Parmlee, 21 Conn. 86.

<sup>2</sup> Reed v. West, 16 Gray, 284.

acting within the scope of authority given him by his companion, it was said that it was properly a question to be left to the jury whether the latter was not bound by the act of the former in accepting a surrender of the term.<sup>1</sup> So, where a tender of an appraisement of real estate was required to be made to the owners, and one of the owners had, during all the proceedings, acted on behalf of himself and the others who were members of his family; and the tender was made to him for the benefit of the family; and he, when such tender was made, said, "We will not receive it"—these facts were thought to satisfactorily show that the person to whom the tender was made was, by his cotenants, authorized to refuse it.<sup>2</sup> A deed of a specific parcel of land made by one cotenant is not binding on the others, nor can their rights be, to any extent, prejudiced by it. Such a conveyance, however, is not void, but voidable only. It may therefore be approved and ratified by the cotenants, and thereby be made to operate as a conveyance in severalty.<sup>3</sup> And so any act done by either co-tenant, in the name and as the act of his companion, becomes binding on the latter from and after his ratification thereof.<sup>4</sup>

<sup>1</sup> *Dodd v. Acklom*, 6 Man. & Gr. 672; 7 Scott N. R. 415.

<sup>2</sup> *Dyckman v. Mayor of N. Y.* 7 Barb. 507; affirmed in 1 Selden, 484.

<sup>3</sup> *Dall v. Brown*, 5 Cush. 289.

<sup>4</sup> *Dyckman v. Mayor of N. Y.* 7 Barb. 507.

## CHAPTER IX.

### TRANSFERRING AND LEASING LANDS OF A COTENANCY.

- Conveyance by one Tenant in Common to another, § 189. .
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§ 189. A conveyance from one tenant in common to another must be in the same form as though the estate conveyed was in severalty, instead of an undivided interest.

Each tenant in common has a several and distinct freehold. And "as they were created by different acts, and different liveries, they must also pass to each other by distinct liveries."<sup>1</sup> "When several persons are tenants in common, or when joint-tenants do by severance become tenants in common, the title to each share is to be carried on precisely in the same manner as if the title to that share was a title to a distinct farm."<sup>2</sup> "Tenants in common cannot *release* to each other; for a release supposeth the party to have the thing in demand; but *tenants in common* have several distinct freeholds, which they cannot transfer otherwise than as persons who are sole seized."<sup>3</sup> "The books may be traced to the earliest periods, and it will be found that no author has maintained that one tenant in common can convey to another in any other way, or by a conveyance whose operation is different from those used by feoffers between whom no such relationship exists. It follows from this that, however conveyances between tenants in common may operate, and they cannot operate by way of release, they must contain *words of perpetuity to pass a fee*."<sup>4</sup>

§ 190. A conveyance from one joint-tenant to another may and ought to be by release. "The *proper* conveyance in this case is *by release*; for one joint-tenant cannot enfeoff his companion, because they are both actually seized of the whole estate."<sup>5</sup> "If there be two *joint-tenants* and one *release* to the other, this passeth a fee without the word *heirs*, because it refers to the whole fee, which they jointly took, and are possessed of by virtue of the first conveyance."<sup>6</sup> But while a release is the *proper* form of conveyance when one joint-tenant wishes to transfer his interest to the other, yet other forms of conveyance, the terms of which are so broad as to comprehend a release, will be allowed to operate accord-

<sup>1</sup> 4 Cruise Tit. 32, c. 6, sec. 25.

<sup>2</sup> 8 Pr. Absts. 49.

<sup>3</sup> 5 Bac. Ab. 240.

<sup>4</sup> Rector v. Waugh, 17 Mo. 28. But see Johnson v. Stevens, 7 Cush. 433, where a release to one tenant in common from the others was treated as sufficient to pass their estate.

<sup>5</sup> 2 Cr. Tit. 18, c. 2, sec. 22; 2 Hil. Real P. 296; Harrison v. Belsey, T. Raym. 413.

<sup>6</sup> 5 Bac. Ab. 240.

ingly, and therefore to transfer the interest of the joint-tenant. Where one joint-tenant sealed and delivered a deed to the other, in which it was expressed that he "granted, bargained, sold, assigned, set over, and confirmed" all his interest, title, and claim on the lands held in jointure, the question was "whether this deed was sufficient to pass the part or share of the joint-tenant who made the deed to the other to whom the deed was made, or not." The Court said, "it was so clear there could be no question about it; and therefore judgment was given for the plaintiff who claimed under the deed."<sup>1</sup> That some words of conveyance have so large a signification as to include and therefore to dispense with the necessity of using words of lesser extent, is mentioned with some emphasis by Lord Coke, where he says: "And here it is to be observed, that some words are large, and have a generall extent, and some have a proper and particular application. The former sort may contain the latter; as *dedi* or *concessi*, may amount to a grant, a feoffment, a gift, a lease, a release, a confirmation, a surrender, etc., and it is in the election of the party to use which of these purposes he will."<sup>2</sup> The general rule is that a deed shall always be carried into effect if possible. The primary intent of the grantor is presumed to have been to pass the land. He is not supposed to have intended it to pass by a particular way, and by no other. If the words which he has employed in his conveyance can in any way take effect as a transfer of the estate intended to be conveyed, it will pass to the grantee, though the deed cannot "operate in the very way which the parties appear to have intended it should operate."<sup>3</sup>

§ 191. **Coparceners may Convey to each other by Release and also by Feoffment.**—"When two or more persons become seized of the same estate by a joint title, either by contract or by descent, as joint-tenants or coparceners, and one of them releases his right to the other, such release is said to enure by way of *mitter l'estate*. For where two several

<sup>1</sup> *Chester v. Willan*, 2 Saund. 96; *Eustace v. Scawen*, Cro. Jac. 696; *Ballard v. Sitwell*, Clayt. 82; *James v. Portman*, Owen, 102; *Thockmorton v. Tracy*, Plowd. 156.

<sup>2</sup> Co. Litt. 301 b.

<sup>3</sup> *Roe v. Tranmer*, 2 Wils. 75; *Sheppard's Touchstone*, 82-3. See note to *Chester v. Willan*, 2 Saund. 96.

persons come in by the same feudal contract, one of them may discharge the other the benefits of such contract by a release; because no notoriety is needful, for there was a sufficient notoriety in the prior feudal contract. Thus, two coparceners come into one entire feud, descending from their ancestor: they may therefore release privately to each other, because they take by the former descent, which established them in possession without notoriety. But since coparceners do also transmit distinct estates to their children, they may pass their estates by distinct feoffments.

In consequence of the privity which must necessarily exist in releases that enure by way of *mitter l'estate*, a fee will pass by such a release, *without any words of limitation*. For the parties are not in by way of the release, but by the original feudal contract, which passed an inheritance; and the release only discharges the pretensions of one of them to the other. So that where one joint-tenant or coparcener releases to the other, the releasee is in by the original conveyance; and such release is not considered as an alienation.”<sup>1</sup>

§ 192. **Conveyance by Cotenant out of Possession.**—Wherever the law forbidding or avoiding conveyances made by a person out of possession of the property is in force, it applies to cotenants as well as to claimants in severalty. The principle that the possession of one part owner is also the possession of the others, may be invoked in aid of such a conveyance. The fact that the grantor was not in the actual personal possession of the land will not avoid his deed, as long as the relation between him and his cotenants is such that he has the right to consider their possession to be for his benefit as well as for theirs. But if they have been guilty of an actual ouster, or if they entered in their own right and not as cotenants, or if from any cause their possession is not his, but on the contrary is adverse to him, then he must regain possession before he can be in a condition to make a conveyance of his interest in the subject of the tenancy.<sup>2</sup>

<sup>1</sup> 4 Cr. Tit. 32, c. 6, secs. 22 and 24; *Rector v. Waugh*, 17 Mo. 28; *Smith on Real and Personal Property*, 242; 2 Hil. Real Property, 300; 1 Washb. on Real Property, 415.

<sup>2</sup> *Constantine v. Van Winkle*, 6 Hill, 196; *Bird v. Bird*, 40 Me. 403.



§ 193. In conveying to third persons, a cotenant, whether joint-tenant, coparcener, or tenant in common, must use the same kind of conveyance as though the estate sought to be transferred were held in severalty. The deed must therefore contain words of inheritance in order to pass an estate in fee.<sup>1</sup>

§ 194. Each cotenant may convey his moiety at pleasure, without the consent or knowledge of either of his companions in interest.<sup>2</sup> This is true in every species of cotenancy. In the case of tenants in common, the grantee is substituted as a tenant in common, having the same rights, and subject to the same obligations, as his grantor. But if the grantor be a coparcener or joint-tenant, his grantee succeeds to the same quantity of interest as that held by the grantor; but he holds it by a different tenure—viz., as a tenant in common, and not as a joint-tenant or coparcener. Few if any questions require to be litigated in reference to the effect of a conveyance of his moiety by one cotenant to a person who thereby becomes a member of the cotenancy. The questions most frequently recurring involve a determination of the effect of a conveyance in which the granting cotenant has assumed to convey, not his moiety, but an entirety.

§ 195. A conveyance made by a cotenant, and assuming to dispose of a part of the lands of the cotenancy, or of the grantor's interest in such part, may become a subject of legal altercation for the purpose of ascertaining—1st, its effect upon the interests of the cotenants who did not unite in its execution; or 2d, its effect upon the interest of the grantor held by him at the time of the conveyance, or subsequently accruing to him by virtue of the cotenancy.

§ 196. The interest of one cotenant cannot be diminished, varied, or otherwise prejudiced or affected by a conveyance made by another cotenant, except in the case of a joint-

<sup>1</sup> 1 Washb. on Real Estate, 412; 3 Pr. on Abstracts of Title, 49; 1 Washb. on Real Estate, 415. In New Brunswick, it has been held, that as a man cannot convey to himself, a deed from A, grantor, to himself and B and C, grantees, vests the whole estate in B and C, because the grant to A is inoperative. *Cameron v. Steves*, 4 All. 141.

<sup>2</sup> *Bradley v. Harkness*, 26 Cal. 77.

tenancy or coparcenary, in which the only effect upon the tenant not joining in the deed is to transform a *joint* estate into a tenancy in common. Whatever the deed may profess to dispose of, the grantee, as between himself and the other cotenants, can obtain no greater interest than his grantor had the right to enjoy.<sup>1</sup> This is true irrespective of the character of the cotenancy, or the nature of the property sold, unless the tenancy consisted of property the title to which could be transferred by mere transfer of possession.

§ 197. **As Color of Title.**—A conveyance by one cotenant, purporting to convey an estate in severalty, cannot operate to the prejudice of another. This is true only so far as the immediate effect of such conveyance as a transfer of title is concerned. It does not follow that no rights can grow out of it, nor that it is, even as against the other cotenants, mere waste paper for all purposes. Such a conveyance constitutes color of title. The entry of the grantee made under the deed, and claiming an interest coëxtensive with that with which the deed purports to deal, is an entry under color of title. The cotenants are therefore bound to take notice of the deed and of the entry made under it; and to take such steps as may be required to enforce a recognition of their legal rights. Should they fail to do so within the time prescribed by the Statute of Limitations, their rights will be no longer susceptible of enforcement; and their interests, by operation of that statute, will vest in the party in possession under the deed.<sup>2</sup>

§ 198. **A conveyance of the minerals in a tract of land, reserving his interest in the land itself, made by a cotenant to a stranger, is regarded as void as against the cotenants of the grantor, “because it is an attempt to create a new and distinct tenancy in common, between one cotenant and the others, in distinct parts of the common estate, which is contrary to the rules of law.”<sup>3</sup>** The reasons on which this rule is based are the same which are thought in many of the States to be sufficient to invalidate a conveyance made by

<sup>1</sup> *Mahoney v. Middleton*, 41 Cal. 52; *White v. Brooks*, 48 N. H. 405; *Bigelow v. Topliff*, 25 Vt. 273.

<sup>2</sup> *Weisinger v. Murphy*, 2 Head, 679.

<sup>3</sup> *Adams v. Briggs Iron Co.*, 7 Cush. 368; *Boston Franklinite Co. v. Condit*, 19 N. J. Eq. 394.

either of the cotenants, and purporting to convey his interest in a part *only* of the lands of the cotenancy.

§ 199. **Is a Deed of a part by Metes and Bounds Void?**—That deeds made by one cotenant conveying a part of the real estate of a cotenancy by metes and bounds are “undoubtedly void, and the other cotenants may at all times so treat them,” is a general declaration made in express terms in some of the cases, and well supported by a long train of decisions,<sup>1</sup> though we cannot see that these decisions are, in turn, supported by reason, or are necessary to the preservation of the rights of the cotenants. Such a conveyance is undoubtedly void so far as it undertakes to impair any of the rights of the other cotenants. It will not justify the grantee in taking exclusive possession of the part described in his deed. It will not deprive the other cotenants of the right to enjoy every part and parcel of the real estate; nor can it, to any extent, prejudice or vary their right to a partition of the common property. The grantee is liable to lose all his interest in the parcel conveyed to him, by its being set off to some other of the cotenants upon partition. But although the deed does not impair the rights of the other cotenants, it by no means follows that they may treat it as void, or entirely disregard it. While falling short of what it professes to be, it nevertheless operates on the interest of the grantor, by transferring it to the grantee. The latter acquires rights which the cotenants ought to be bound to respect. They ought not to be permitted to ignore his conveyance, and treat him as one having no interest in the property.

§ 200. **The reasons on which the rule stated at the beginning of the preceding section, and there admitted to be sustained by the weight of authorities, has been supported by**

<sup>1</sup> *Marshall v. Trumbull*, 28 Conn. 185; *Mitchell v. Hazen*, 4 Conn. 509; *Griswold v. Johnson*, 5 Conn. 365; *Hinman v. Leavenworth*, 2 Conn. 244; *Porter v. Hill*, 9 Mass. 35; *Bartlett v. Harlow*, 12 Mass. 348; *Smith v. Benson*, 9 Vt. 140; *Gates v. Treat*, 17 Conn. 392; *The Boston Franklinite Co. v. Condit*, 19 N. J. Eq. 401; *Holcomb v. Coryell*, 3 Stock. 548; *Blossom v. Brightman*, 21 Pick. 284; *Peabody v. Minot*, 24 Pick. 333; *Lamb v. Wakefield*, 1 Saw. C. C. 256; *Dorn v. Dunham*, 24 Tex. 377; *Good v. Coombs*, 28 Tex. 51; *Primm v. Walker*, 38 Mo. 98; *Phillips v. Tudor*, 10 Gray, 82; *Jeffers v. Radcliff*, 10 N. H. 246; *Great Falls Co. v. Worster*, 15 N. H. 449; *Duncan v. Sylvester*, 24 Me. 485; *Cogswell v. Reed*, 12 Me. 200; *Gibbs v. Swift*, 12 Cush. 398; *Carroll v. Norwood*, 1 Har. & J. 100; *Richardson v. Miller*, 48 Miss. 334.

the Courts, are very fairly shown and illustrated by Chief Justice Shaw, in the case of *Adam v. Briggs Iron Company*.<sup>1</sup> “The ground upon which the doctrine is established is, that a tenant in common of an entire estate is entitled, on partition, to have his property assigned in one entire parcel according to his aliquot part. The respective cotenants may convey their shares to one or many grantees, as they please, so it be of the entire estate; because, whether there be one or many cotenants, each may still have partition, which is inseparably incident to an estate in common, and have it in one parcel, and of the like kind and quality with the estate which he holds in common. I have a moiety; my cotenant has a moiety. He may convey a quarter of the whole estate to one, an eighth to another, a sixteenth to another, and so on indefinitely, letting in other cotenants with me. But all being seized of aliquot parts, in the same estate, and of like kind and quality, my right to partition is not disturbed by the number of the cotenants. But if he could convey his aliquot part, in specified parcels of the estate, he might diminish the value of my right, if not render it worthless.” In another case, the additional reason is adduced for considering the deed void, viz., “that such deed breaks the unity of possession.”<sup>2</sup> The reasons supporting the rule that a deed of his interest in a specified part of the whole tract, when made by one cotenant, may be treated as a nullity by the other cotenants, are: 1st, that such conveyance would destroy the unity of possession; and 2d, that it would impair the right to partition. It is not claimed that such a deed, if treated as valid to the extent of passing the title of the grantor, would affect the right of the cotenants not joining in its execution, to enter upon and enjoy the common property as fully as they might lawfully do before the conveyance was made. The unity of possession would be broken to this extent only: one of the original cotenants would relinquish his right to enter upon and enjoy a part of the premises, and the right so relinquished would pass to another person, to be exercised only within the limits prescribed by the deed. This partial de-

<sup>1</sup> 7 Cush. 369.

<sup>2</sup> *Primm v. Walker*, 38 Mo. 98; but this case is overruled by *Barnhardt v. Campbell*, 50 Mo. 598.

struction of the unity of possession has not seemed obnoxious to Courts in a State where the right to convey a part by metes and bounds has been uniformly denied. Thus, in an early case in Massachusetts, a cotenant had leased a part of the lands of the cotenancy, and the question arose whether such lease was void as against the other cotenants. The Court argued that as each cotenant, until partition, had a right to occupy any part of the common property, and as he might assign this right of occupancy to a stranger, and as the leasing was but an assignment of this right, that the lease must be held valid in law.<sup>1</sup> This decision, so far as we can ascertain, has never been questioned. If it can be accepted as a true exposition of the law, it follows that the unity of possession between tenants in common, or other cotenants, may be so far broken that one of them may, by his own act, relinquish his right to be in possession of some part, and transfer such right to a stranger. If the unity of possession may be so broken by a lease, we see no reason why a conveyance should be declared void for attempting to do what might be lawfully accomplished by a lease. The second objection made to a conveyance of a part of the subject of the tenancy—viz., that it would impair or defeat the rights of the other cotenants to a partition—is not good, because, in point of fact, it is not true. The rule maintained by the cases which we shall now proceed to consider, gives the deed effect even against the cotenants, yet assures to the latter every right which they had before it was made.

§ 201. **Rule in Ohio.**—In what is probably the earliest case affirming the right of either cotenant to convey, by metes and bounds, his interest in a part of the common property, the Court said: “The determination of this question is attended with considerable difficulty. This difficulty, however, arises not so much from any apparent inconsistency or impropriety in such grant, as from a possible inconvenience which might result to the cotenant who retains his estate. One tenant in common may grant his entire interest or estate in a particular species of property—a tract of land

<sup>1</sup> *Rising v. Stannard*, 17 Mass. 285.

for instance—or he may grant *one-half* as a smaller proportion of his interest in the same entire property. If this be correct, no good reason is perceived why he may not grant his entire interest in a *particular part*. A and B are seized of a section of land as tenants in common. It is well established that A may grant his entire interest or estate in the section, and the conveyance will be valid. Upon what principle, then, can it be said that if he convey his entire interest in *particular quarter* of such section, such conveyance shall be void? Certainly A and B, tenants in common as aforesaid, might with propriety unite and convey a *particular quarter* of the section, and a complete title in the grantee would be vested. Would not the title of the grantee be equally valid if the tenants in common should, by separate deeds, convey to him their individual interest in that *particular quarter*? This question, it is believed, must be answered in the affirmative, and if so, it proves conclusively, that one tenant in common may transfer to a third person his entire interest in a part of the property held in common. Otherwise, we run into the absurdity that a deed, properly executed by one individual, which is an entire thing, and purports to convey a specific property, must depend for its validity upon the execution of a similar instrument by a third person, who is no way party to the first. The principal reason assigned why one tenant in common shall not be allowed to convey, as before stated, is, that by so doing, he may do a great injury to his cotenant, by compelling him, in case of partition, to take his proportion of the estate in small parcels, very much to his disadvantage. If such evils would result, they ought, if possible, to be avoided. It does not follow, however, that because one of two tenants in common can convey his estate in a *part* of the property so held, therefore the rights of his cotenant are affected. This cotenant will still have the same interest in every part, and in the whole of the property. He can still compel partition, and may have his share of the property set off to him in severalty, in the same manner he could have done had no conveyance been made.”<sup>1</sup>

<sup>1</sup> Lessee of White v. Sayre, 2 Ohio, 112; Ebenezer Prentiss' Case, 7 Ohio, 473; Treon v. Emerick, 6 Ib. 391; Dennison v. Foster, 9 Ib. 126. See also Campan v. Godfrey, 18 Mich. 32.

§ 202. In Virginia, the doctrine of these Ohio decisions has been affirmed. The Court of Appeals, in determining the effect of a conveyance, such as we are now considering, treated it as valid to the extent of transferring to the grantee such rights as the grantor possessed, and thereby making the grantee cotenant with the cotenants of the grantor. "The deed being good against the grantor, the entry of the tenant under it would be lawful; and though it might be inoperative, so far as the rights of the cotenant were thereby prejudiced, yet as it would invest the grantee with the estate of the grantor, so far as he could lawfully convey, the grantee would be tenant in common with the cotenant of his grantor to the extent of the interest conveyed. His possession and seizin would be the possession and seizin of both, because such possession and seizin would not be adverse to the right of his companion, but in support of their common title."<sup>1</sup>

§ 203. In California, this question has been decided by the Supreme Court in at least two careful and well considered judgments. In the first, Field, then Chief-Justice of California, now an Associate Justice of the Supreme Court of the United States, quoted with approbation the decisions made in Ohio and Virginia. The argument put forth in *Smith v. Benson*,<sup>2</sup> that "if one tenant in common is permitted to convey his portion of the estate by separate parcels to more than one, he may to any number, and if these conveyances are valid, the cotenant is bound to make partition with each of these separate grantees, and an estate which originally was valuable, with a right to partition with one only, becomes wholly worthless from the obligation to submit to perpetual subdivision," was thus answered by Judge Field: "But we do not see that any such result necessarily follows, for the partition may be directed without reference to the grantees under the conveyances, further than to make them parties to the proceedings in partition, in connection with their grantor, as representing his interest as original cotenant. Their claim to control or affect the partition, by reason of their respective

<sup>1</sup> *Robinett v. Preston's Heirs*, 2 Rob., Va., 278.

<sup>2</sup> 9 Vt. 141.



conveyances, may be entirely disregarded. The grantees are to be considered as taking their conveyances subject to this condition. Their position in that respect is not very dissimilar to that of grantees of premises upon which judgments stand as liens, or in relation to which suits are instituted, with notice of their pendency filed in the Recorder's office. Such grantees would acquire interests, liable indeed to be destroyed by sale under the judgments, or the result of legal proceedings, but, until such destruction, capable of enforcement against intruders and trespassers."<sup>1</sup> In a subsequent case, in the same State, the general effect of such a conveyance is described as follows: "The rights thus assigned to the grantee are precisely those pertaining to the grantor in the special tract—no greater, and no less. The grantor, before his conveyance of the special tract, held his undivided interest therein subject to the contingency of the loss of it, if on partition of the general tract the special tract should be allotted to one of his cotenants. The grantee then acquires all the interest of his grantor in the special tract, and that interest is a tenancy in the special tract in common with the cotenants of his grantor; but his conveyance did not sever the special tract from the general tract, so far as the cotenants are concerned, and the general tract is therefore liable to a partition so far as the cotenants of the grantor are concerned, as it would be had the conveyance of the special tract not been made."<sup>2</sup> In the case from which this last quotation is taken, the precise question before the Court was whether the grantees of specified parcels under the original tenants in common were necessary parties to proceedings for partition. The case presented the remarkable and perhaps unprecedented peculiarity, that while the premises in litigation included twenty-five thousand acres of land, no person had title in severalty to any part, nor did any one have an undivided interest in the whole. This peculiarity might have been urged, independent of general principles, as a controlling reason for allowing and requiring the partition to be conducted by and against grantees of specified tracts.

<sup>1</sup> *Stark v. Barrett*, 15 Cal. 370.

<sup>2</sup> *Gates v. Salmon*, 35 Cal. 588; *Sutter v. San Francisco*, 36 Cal. 115.



This case, so far as it holds that such grantees are necessary parties to partition, is in harmony with decisions in some of the States, whose Courts, in other respects, have not fully recognized the doctrines of the Ohio, Virginia, and California decisions.<sup>1</sup>

§ 204. **The Supreme Court of Missouri**, quite recently in opposition to an *obiter dictum* contained in an earlier decision of the same tribunal, declared in favor of the validity, as against his cotenants, of a conveyance of a part of the lands of the tenancy made by one of the tenants in common. The Court contended that such conveyances did not, as much as at common law, interfere with partitions of the common property; that while under the common law a partition was made in kind, it was, under the law of Missouri, not necessary to make it in that manner, but the property might be sold and the proceeds distributed among the parties according to their respective rights; and that a conveyance of small interests, if likely to prejudice the co-owners upon a partition in kind, could be rendered harmless to work injustice, by ordering a sale of the whole property, at which each tenant has the liberty of purchasing as he may think proper. "When the reason for the rule ceased, the rule itself also ceased, and accordingly, such conveyances have been made, and acquiesced in by the legal profession as valid. Large amounts of property, no doubt, have been acquired, and are now held on the faith of their validity; and under the circumstances, it is the duty of the Court, when no rule of law is violated, to uphold them, and to protect the citizens in the enjoyment of their just acquisitions."<sup>2</sup>

§ 205. **But in no case can the conveyance of one tenant** in common, or of any less than all the cotenants, give the grantee any greater rights than those held by the grantor or grantors. As neither cotenant, nor any number less than the whole, can of right exclusively occupy any specific parcel of the premises, no grantee from any less than all the tenants can acquire the right to exclusively enjoy any specific parcel.

<sup>1</sup> Harlan v. Langham, 69 Pa. St. 238; Whitton v. Whitton. 88 N. H. 133.

<sup>2</sup> Barnhart v. Campbell, 50 Mo. 599.

And as no cotenant, nor any number less than all, can of right demand that a particular part shall be set off to him or them upon partition, therefore no grantee of any less than all the part owners can acquire such right.<sup>1</sup> But while no such grantee has an absolute legal right to have the part granted to him set off to him or to his grantor upon partition, yet he has rights which will receive the consideration of the Court, and will be respected as far as they can be without prejudice to the rights of the other part owners. The Court, wherever the interests of the other owners will not be impaired thereby, will set off to grantees of specified parcels the tracts included within their respective deeds.<sup>2</sup>

§ 206. **Conveyance of Part, as between the Parties.**—From a decision in Maine, we infer that the Courts of that State are inclined to declare a deed made by a cotenant and purporting to convey a part of the premises in severalty, inoperative for all purposes until such tract shall be set off to the grantor in severalty, or the conveyance shall be otherwise ratified by the other cotenants. “Such a conveyance,” says the Court, “cannot, in any event, operate contrary to the expressed declarations and intentions of the parties, to convey an estate in common instead of an estate in severalty. While the law, for the purpose of making a deed operative, will give it such a construction that it may, if possible, convey by any legal mode of conveyance the estate intended to be conveyed, it will not permit such a construction as would convey an estate of a different kind or description from that intended to be conveyed.”<sup>3</sup> But this decision, in so far as it determines that a conveyance by a cotenant assuming to transfer an estate in severalty can have no effect until the grantor has an estate in severalty on which the deed may operate, has never, so far as we can ascertain, been approved. It was a logical conclusion drawn from a false premise. If it were true that a conveyance were never permitted to convey any estate different

<sup>1</sup> *Dorn v. Dunham*, 24 Tex. 376; *Stark v. Barrett*, 15 Cal. 368.

<sup>2</sup> *McKee v. Bailey*, 11 Gratt. 346; *Campau v. Godfrey*, 18 Mich. 38; *Holcomb v. Coryell*, 3 Stock. 548.

<sup>3</sup> *Soutter v. Porter*, 27 Me. 417.

from that intended to be conveyed, then we should agree in the conclusion announced in Maine. But such is not the case. "If a deed cannot operate in the manner intended by the parties, the Judges will endeavor to construe it in such a way as that it shall operate in some other manner."<sup>1</sup> "When the deed cannot take effect, according to the letter, it will be construed so as it may take some effect or other."<sup>2</sup> Although a grantee may not obtain the kind of estate, or the quantity of interest for which he bargained, we know of no reason why he should be denied such a lesser estate or interest as his grantor could convey. The question whether a conveyance in severalty can operate as a conveyance of an interest in an estate held in cotenancy can not arise between the grantor and the grantee in the deed, because the former is estopped from raising it. The case is simply one where a grantor conveys a greater interest than he owned at the time. It is the ordinary case where a party is estopped to claim that he owned a less interest than his deed purports to convey."<sup>3</sup> Even in Massachusetts, a State where the Courts have been inclined to restrain the power of cotenants to make any conveyance, on its face inconsistent with the cotenancy, it is established that a deed "by metes and bounds is not void, but is good against everybody but the cotenants, and can only be avoided by them."<sup>4</sup>

§ 207. **Conveyance of Part, Effect after Partition.**—In the preceding section, we discussed the question whether a conveyance made by one tenant in common, purporting to convey part of an estate in severalty, could take effect so as, between the parties, to transfer the undivided interest; and this question we found not altogether free from doubt. But when, upon partition, or by conveyance from his cotenants, or through any other means, the grantor acquires an estate in severalty in the premises so conveyed by him, this subsequently acquired estate vests in his grantee by operation of

<sup>1</sup> Jackson v. Blodgett, 16 Johns. 178; Goodtitle v. Bailey, Cowp. 600.

<sup>2</sup> 1 Pr. Abs. Title, 312.

<sup>3</sup> Smith v. Modus Water Power Co., 35 Conn. 400.

<sup>4</sup> Dall v. Brown, 5 Cush. 291.

the previous conveyance. In this proposition, all the authorities treating upon this subject seem to concur.<sup>1</sup>

§ 208. **Where Cotenancy includes Distinct Parcels.**—The rule that one cotenant cannot convey his moiety in a specified part of the lands held in common, does not, according to a preponderance of the authorities, even where it is recognized as of general obligation, apply to the conveyance of an entire lot or parcel of land, though the cotenants of such lot or parcel are also cotenants of other lots or parcels. So, though the subject of the tenancy may consist of a single tract of land of which neither cotenant could convey his interest in a part, as against his cotenant, yet the cotenants may, by an agreement express or implied, convert this tract into several smaller tracts. This happens when all the cotenants, or when one with the approbation of the others, cause the tract to be laid out into town lots or blocks, separated from one another by streets and alleys. In such cases, the acts of the parties turn a cotenancy of one large tract into several cotenancies of several distinct but smaller tracts, “and they become tenants in common of each lot or parcel by itself.” Therefore, “one of them may convey all his undivided interest in the whole of any one of these distinct parcels; and his deed will be valid and effectual against his cotenants.”<sup>2</sup> But cases are not wanting which limit the right of a cotenant to convey his interest in any specific part of the lands of the cotenancy, although they consist of distinct parcels. As the chief objection to such conveyance is its alleged interference with the right to partition, it is claimed that this objection exists with equal force where the lands, though separate, are within the same jurisdiction, and are therefore liable to partition in the same proceeding. For instance, if A and B own two lots of land as cotenants, an

<sup>1</sup> *Primm v. Walker*, 38 Mo. 97; *Cox v. McMullin*, 14 Gratt. 90; *Cunningham v. Pattee*, 99 Mass. 251; *De Witt v. Harvey*, 4 Gray, 491; *Johnson v. Stevens*, 7 Cush. 433; *Campau v. Godfrey*, 18 Mich. 37; *Challefox v. Ducharme*, 4 Wis. 554; *Smith v. Benson*, 9 Vt. 138; *McKee v. Barley*, 11 Gratt. 340; *Cogswell v. Reed*, 12 Me. 198; *Holcomb v. Coryell*, 3 Stock. 548.

<sup>2</sup> *Primm v. Walker*, 38 Mo. 98; *Carroll v. Norwood*, 1 Har. & J. 100; *Holmes v. McGee*, 27 Mo. 597; *Butler v. Roys*, 25 Mich. 54; *Starr v. Leavitt*, 2 Conn. 246; *Reinicker v. Smith*, 2 Har. & J. 421.

advantageous partition may often be accomplished by assigning one to A and the other to B. But if B may sell his interest in one lot, then A must submit to two actions for partition, resulting in his having not one whole lot, but two half lots, situate in different localities. For these reasons, it has been intimated that the rule forbidding conveyances by either cotenant of his interest in a part of the subject of the tenancy, applies where the lands are in distinct parcels, but all situate in one county.<sup>1</sup> So it has been held, with a great exhibition of confidence in the correctness of the decision, that the rule extends to "a variety of tracts of land throughout the State."<sup>2</sup>

§ 209. **An agreement to convey, entered into by several cotenants, by which they stipulate that they will give "a good and sufficient warranty deed," etc., does not require either to warrant the title of the others. It is complied with if each makes a separate deed of his moiety containing the stipulated covenant, or if all join in a deed in which each grantor warrants his share, but not that of his co-grantor.**<sup>3</sup>

§ 210. **Covenant of Seizin, when Broken.**—If a cotenant undertake to convey his interest in a part of the premises, and insert in the conveyance a covenant that he has a good right to sell and convey, such covenant is broken instantaneously upon the delivery of the deed, if the lands be situated in one of the States in which such attempted transfers are regarded as void.<sup>4</sup> Where a grantor covenants that he is seized in fee of an *undivided* interest in the premises conveyed, and partition had previously been made by order of Court, of which he was ignorant, he is liable on his covenant, although he conveys no more than his original portion of the whole tract.<sup>5</sup> When he conveys the premises in severalty with a covenant of seizin, he becomes liable for the breach of his covenant as to the moiety of his cotenant. The damages are one-half of the consideration of the deed, where the interest of the other cotenant is an undivided one-half,<sup>6</sup> and, in other

<sup>1</sup> Peabody v. Minot, 24 Pick. 333.

<sup>3</sup> Coe v. Harahan, 8 Gray, 198.

<sup>5</sup> Morrison v. McArthur, 43 Me. 567.

<sup>2</sup> Thompson v. Barber, 12 N. H. 565.

<sup>4</sup> Mitchell v. Hazen, 4 Conn. 495.

<sup>6</sup> Downer v. Smith, 38 Vt. 468.

cases, we suppose, would bear the same proportion to the consideration paid for the conveyance that the title of the non-conveying cotenants bears to the title assumed to be conveyed.

§ 211. **Words in Deed restricted to Interest Conveyed.**—A conveyance of an undivided half of a certain farm, bounded, etc., (giving the exterior boundaries,) together with all the grantor's "estate, right, title, interest, claim, and demand whatsoever," which he hath to the above described premises, either in law or in equity, from the last will of S. S., etc., does not convey, nor purport to convey, any more than an undivided one-half interest. The general words used must be restrained to the particular occasion. The object of the deed was undoubtedly to convey but a moiety, "and the general words are thrown in to show how the right of the grantor was derived."<sup>1</sup> If the description in a deed is "one-half of the land hereinafter described, both in quantity and quality, one-half of all the lands contained within the bounds hereafter mentioned, namely, beginning, etc., the one-half of the whole of said land, and one-half of the buildings on the same, *and also* one other piece of land, containing, etc., and bounded," etc., such description will be construed as effecting a conveyance of one-half only of the last named tract. "The terms *and also*, which introduce the description of the land in question, show that the same portion of the land was intended to be granted as of that described in the preceding part."<sup>2</sup>

§ 212. **The rights of different grantees in severalty of distinct parcels of land from the same cotenant are equal, irrespective of the dates of their several grants.** Thus, if a tenant in common of a lot of land sell and convey the north one-half thereof in severalty to A, and the south one-half thereof in severalty, at a subsequent date, to B, A has not, on account of the priority of his grant, any superior legal or equitable rights to B. If, at the time of the conveyances, the parties all supposed the grantor to be seized of an estate in severalty, and a moiety thereof is afterwards recovered by a claimant

<sup>1</sup> Jackson v. Stevens, 16 Johns. 114.

<sup>2</sup> Hapgood v. Whitman, 13 Mass. 465.

under a paramount title, A cannot compel such a partition as will set off the north half to him, and leave the moiety recovered to be assigned out of B's half. "There seems no such relations between earlier and later purchasers as authorize the former to impose any such obligations on the latter. The rights and equities of each are equally ample and perfect. The loss which they suffer in this instance is not from an incumbrance, which may be extinguished, either by the appropriation of the land left with the heirs or a contribution among themselves, but is a full and paramount right over a portion of the lands of each. As respects heirs, we would endeavor to mould their rights, so as to protect the alienee of their ancestor, but we find no authority to apply any such principles between purchasers, and we must leave each to sustain his share of the burthen."<sup>1</sup>

§ 213. **Involuntary Transfer.**—The interest of either cotenant may be divested from him and vested in another by involuntary transfer thereof, the same as though the property were held in severalty. No one, so far as we know, has ever denied that the interest of a cotenant may be seized, either upon execution or attachment, and thereby appropriated to the discharge of his liabilities. The cases in which such seizures and appropriations have been sustained are numerous.<sup>2</sup> The chief difficulty has been to determine the respective rights of the seizing officer and the cotenants of the judgment or other debtor to the possession of the property, and the extent of property which must be embraced in a levy upon the real estate of a cotenant.

§ 214. **Officer with Execution may take Exclusive Possession.**—In respect to the relative rights of an attaching officer and the cotenant of the person against whom the attachment issued, to the possession of personal property taken under the attachment, there is no doubt that the officer is entitled to take exclusive possession and to retain such posses-

<sup>1</sup> *Dennison v. Foster*, 9 Ohio, 180.

<sup>2</sup> *Melville v. Brown*, 15 Mass. 82; *McMechan v. Griffing*, 9 Pick. 537; *Heydon v. Heydon*, 1 Salk. 392; *Buddington v. Stewart*, 14 Conn. 408; *Hayden v. Binney*, 7 Gray, 416; *James v. Stratton*, 32 Ill. 202; *Munroe v. Luke*, 19 Pick. 39; *Strickland v. Parker*, 54 Me. 263.



sion until the sale, and may deliver the whole to the purchaser.<sup>1</sup> It is conceded that this rule works a hardship upon the cotenant whose interest is not attached, and who has been guilty of no act or default which ought to prejudice him, by producing a temporary suspension of the rights and privileges of ownership. The officer must not undertake to sell the whole. Though, for the purposes of the writ, he may take exclusive possession, he has no right to assume the authority of conveying title to the whole; and whether he assumes to do so or not, he cannot affect the title of any cotenant not included in his writ. An involuntary, like a voluntary transfer or conveyance, cannot prejudice those who are not in law parties to it. Upon a sale of property upon execution, the purchaser becomes tenant in common with the cotenant of the judgment debtor. The attaching officer, it is said, is not bound to permit a severance and partition of chattels in his possession. If the cotenant of the judgment debtor severs his share from the goods seized under the writ, he is liable to the officer in an action of trover. The creditor is not compellable to assent to a division. He has the right to seize upon and sell the undivided share of the debtor in the whole property.<sup>2</sup> If the officer levy upon the property as belonging to the defendant exclusively, instead of levying upon his undivided interest, this is an invasion of the rights of the other cotenants, for which they may sustain an action.<sup>3</sup>

§ 215. **Officer must take Possession.**—The officer holding a writ of attachment or execution against one cotenant may, as we have seen, take exclusive possession of the chattel levied upon, retain it until the sale, and then deliver it to the purchaser. But taking possession is not optional with the officer. He must take possession, or in some way subject the property to his control, in order to make a valid levy and sale.<sup>4</sup>

<sup>1</sup> *Waldman v. Broder*, 10 Cal. 378; *Walsh v. Adams*, 3 Denio, 125; *Bernal v. Hovious*, 17 Cal. 547; *Caldwell v. Anger*, 4 Minn. 217; *Waddell v. Cook*, 2 Hill, 48; *Philips v. Cook*, 24 Wend. 389; *Welch v. Clark*, 12 Vt. 686; *Whitney v. Ladd*, 10 Vt. 165; *Reed v. Shepardson*, 2 Vt. 120.

<sup>2</sup> *Reed v. Howard*, 2 Met. 40.

<sup>3</sup> *Neary v. Cahill*, 20 Ill. 214; *King v. Manning* Com. Rep. 619; *Waddell v. Cook*, 2 Hill, 48.

<sup>4</sup> *Brown v. Lane*, 19 Tex. 203; *Converse v. McKee*, 14 Tex. 30.



§ 216. **Conveyance of Part under Execution.**—We have already seen that the decisions determining the effect of a conveyance made by a cotenant, and purporting to convey his interest in some specified parcel, are very inharmonious. The reasons which exist in the case of a voluntary are somewhat different from those accompanying an involuntary conveyance. The purchase of a grantor's interest in a specified parcel is in effect a wager that such parcel will be set off to him on partition, or otherwise confirmed to him by the other cotenants. Still, if such circumstances exist that the grantor sees fit to make, and the grantee to accept, a conveyance which may, in the event of an unfavorable partition, convey nothing, we can see no valid reason for denying the utmost effect to the deed which it can be given, consistently with the rights of the other cotenants. But in the case of an involuntary transfer of property, the interest of the person whose estate is to be divested by compulsion ought to be carefully considered and jealously guarded. If an officer may lawfully levy on a specific parcel and subject it to a forced sale, he may thereby sacrifice the property of the defendant, for few persons would be found willing to bid for that which, when purchased, consisted of a mere contingent interest—an interest which the other cotenants were not bound to notice, and which might be finally lost upon a partition of the common property. Hence the rule, supported by a decided preponderance of authorities, is that a levy and sale of the debtor's interest in a specific part of the lands cannot be sustained.<sup>1</sup> The highest judicial tribunals in several of the States, as we have shown, have declared themselves in favor of sustaining conveyances by metes and bounds of a part of a cotenant's lands as far as may be done without prejudicing the cotenants of the grantor. Whether all these tribunals would uphold an involuntary conveyance of the same nature cannot be ascertained, because the question does not seem to have arisen except in the State of Ohio. In that State, the deed of the sheriff is given the same effect, in this respect,

<sup>1</sup> *Hinman v. Leavenworth*, 2 Conn. 244; *Starr v. Leavitt*, 2 Conn. 246; *Staniford v. Fullerton*, 18 Me. 229; *Lawrence v. Burnham*, 4 Nev. 368; *Soutter v. Porter*, 27 Me. 405; *Smith v. Knight*, 20 N. H. 17.

as though it were a voluntary conveyance.<sup>1</sup> But if the same persons are cotenants of separate tracts of land, an execution need not be levied upon both tracts. A levy upon and sale of one tract is not an attempt to create new tenancies, for each separate tract is generally treated as forming the subject of an independent tenancy.<sup>2</sup>

§ 217. **Execution against both Cotenants.**—If an execution be issued against two or more cotenants, and one of them point out certain real estate as being subject to levy as the property of his co-defendant, and thereupon such property is levied upon, advertised, and sold as the property of such co-defendant, when in fact it belonged to both defendants, the only title divested by the sale is that of him whose interest was seized. The fact that both cotenants were also judgment debtors does not alter the effect of the sale;<sup>3</sup> nor does the pointing out of the property as subject to levy as above stated, create any such estoppel as to prevent him who so pointed it out from asserting his title as a part owner.<sup>4</sup>

§ 218. **A policy of insurance containing the stipulation** “that, in case of any sale, transfer, or change of title of any property insured by this company, or of any individual interest therein, such insurance shall be void and cease,” is rendered void by a sale and transfer by one partner to one of his co-partners of his interest in the partnership property without the consent of the company.<sup>5</sup> The condition of this policy included, in language too clear to be misunderstood, a transfer by one partner or cotenant to the other, because it expressly stipulated against conveyances of any “individual interest.” But the same rule has been applied where the condition being expressed in less precise terms, provided “that if the property should be sold or conveyed without the consent of the company, it should be void.” The reasons given in support of the rule are, that “in making contracts of insurance, the company has regard to the habits and character of the other contracting parties. If a firm is composed

<sup>1</sup> Treon v. Emerick, 6 Ohio, 399.

<sup>2</sup> Butler v. Roys, 25 Mich. 53.

<sup>3</sup> Southerland v. Cox, 3 Dev. 394.

<sup>4</sup> Andrews v. Murphy, 12 Ga. 431.

<sup>5</sup> Dix v. The Mercantile Ins. Co., 22 Ill. 272; The Hartford Fire Ins. Co. v. Ross, 29 Ind. 182.

in part of prudent, careful men, a company may be willing to insure the property of the firm, though the others are of an entirely different character. But if, after this was done, those who were prudent and careful, could, by selling out to the others, leave the company exposed to the unguarded negligence of the latter, it might suffer the same evil as from a sale to strangers."<sup>1</sup> But this line of reasoning has not always been regarded as conclusive, and, in a number of cases, it has been adjudged that a transfer from one part owner to another is not within the general prohibition of alienation of the property insured.<sup>2</sup> In deciding this question, the Court of Appeals of the State of New York said: "It is suggested that the proviso may have been designed to secure the continuance in the firm of the only member in whom the insurers reposed confidence. The only evidence of their confidence in either is the fact that they contracted with all; and the theory is rather fanciful than sound, that they may have intended to conclude a bargain with rogues, on the faith of a proviso that an honest man should be kept in the firm to watch them. Certainly, nothing appears in the present case to indicate that all the assured were not equally worthy of confidence; and it is not to be presumed that, in any case, underwriters would deliberately insure those whose integrity they had reason to distrust."<sup>3</sup> The answer here given to the argument that the proviso may have been inserted to retain in the firm some member in whose honesty the assurers had especial confidence, is equally applicable as a reply to the other argument, that such proviso may have been incorporated in the policy to secure the continuance in the firm of the member upon whose discretion and caution the insurers chiefly relied. The theory is truly more fanciful than real. If any such special confidence induced the granting of the policy, this fact ought to be proved rather than presumed. But the chief

<sup>1</sup> Keeler v. Niagara Fire Ins. Co., 16 Wis. 536; Finley v. The Lycoming County Mutual Ins. Co., 30 Pa. St. 312; Buckley v. Garrett, 47 Pa. St. 204.

<sup>2</sup> McMasters v. The Westchester Mutual Ins. Co., 25 Wend. 379; Tillou v. Kingston Mutual Ins. Co., 7 Barb. 570; Wilson v. The Genesee Mutual Ins. Co., 16 Barb. 511; 4 Kern, 418; Dey v. The Poughkeepsie Mutual Ins. Co., 23 Barb. 627; Buffalo Steam Engine Works v. The Sun Mutual Ins. Co., 17 N. Y. 412; Hobbs v. Memphis Ins. Co., 1 Sneed, 444.

<sup>3</sup> Hoffman v. Etna Ins. Co., 32 N. Y. 411.

vice of the rule that alienation between joint owners avoids a policy of insurance is, that it seems to be as applicable to the transfer of the interest of the dishonest and imprudent, as to that of the honest and prudent cotenant.

§ 219. **The change of possession necessary to free a sale of personal property from the imputation of fraud, and to render it valid as against the creditors of the vendor, cannot always be accomplished when the chattel belongs to cotenants, only one of whom parts with his interest. If a chattel be in the possession of A, B, the cotenant of A, has no legal means of acquiring possession. B may sell his interest to C, but he cannot authorize C to take possession. C must therefore wait until A is willing to surrender possession, or until, in some unguarded moment, he allows C an opportunity of seizing and carrying it away. The law does not require C to obtain possession from A, in order to establish, even as against creditors, the validity of his purchase from B.<sup>1</sup>**

§ 220. **Cotenants may lease either to one another or to strangers. They may all concur in the lease, or each may lease his moiety separately. If, however, the lessors be coparceners or tenants in common, the lease operates as the separate demise of each, and must be so treated. Leases made by cotenants are subject to the same limitation in their effect to which conveyances are subject: viz., they cannot transfer any higher right than the cotenant making them possessed; they cannot impair the rights of the other cotenants, nor confer a right to occupy the whole, nor any particular part in severalty. But one joint-tenant may impair or postpone the rights of the other, as survivor. "As each of several joint-tenants in fee, or for their lives, has an estate not only for his own life, but for his companion's too, he may grant a lease for years of his own share, to commence at a future day, nay, even after his death, the term in the meantime existing in interest, though not in possession. And the same rule prevails in the case of joint-tenants for years."<sup>2</sup>**

<sup>1</sup> *Beaumont v. Crane*, 14 Mass. 400; *Cushing v. Breed*, 14 Allen, 380.

<sup>2</sup> See 1 Platt on Leases, p. 125 to 138, for full treatment of subject of leases by and between joint-tenants, tenants in common, and coparceners.

## CHAPTER X.

### OF THE OUSTER OF ONE COTENANT BY ANOTHER.

- Difference between Evidence of, and of ordinary Ouster, § 221.
- Burden of Proving, § 222.
- By Adverse Entry, § 223.
- By Entry under Deed of the Whole, § 224.
- By Entry under Deed of the Whole, § 225.
- Conveyance of the Whole, without Entry, § 226.
- Possession under Decree of Partition, § 227.
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- Notice of Ouster, whether must be given Tenant Ousted, § 229.
- Notice of Ouster, whether must be given Tenant Ousted, § 230.
- Difference between Ouster as Defence and as Cause of Action, § 231.
- Is a question for the Jury, § 232.
- Must be found in direct terms, § 233.
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- Ouster by Refusal, what demand necessary to, § 237.
- Ouster by Receiving Rents, § 238.
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- Ouster, unequivocal acts essential to, § 241.
- Ouster, when may be inferred, § 242.
- Disseizor, taking Deed from a Cotenant, § 243.
- Ouster, Statute in England concerning § 244.

§ 221. **An ouster of his cotenant by a tenant in common** is an act which may, in general terms, be described in the same language as any other ouster, *i. e.*, it "is a wrongful dispossession or exclusion of a party from real property, who is entitled to the possession." Ouster, both where the property is owned in severalty and where it is held in undivided interests, depends upon the intent of the party taking and holding possession. This intent can rarely be established by the declarations or confessions of the party in whose mind it is claimed

to have been formed. It must therefore generally be evidenced from the *acts* of the party. If a person having no title thereto enter upon a parcel of land and subject it to his dominion, and claim and exercise the rights of ownership over it, little or no doubt can exist, in the absence of explanatory circumstances, that he intended to oust the true owner. But if, on the other hand, a cotenant enter upon the whole or any part of the realty of the cotenancy, as he has a legal right to enter, the law presumes that he intends nothing beyond an assertion of his right. There must, therefore, exist other and stronger evidence to prove that one cotenant has ousted another, than would be required to prove that a person having no right to the possession had ousted an owner in severalty.<sup>1</sup> An ouster, "as against a cotenant, cannot be proved merely by acts which are consistent with an honest intent to acknowledge and conform to the rights of the cotenant, although such acts might be sufficient evidence of an ouster between the parties, if there was no tenancy in common, and each claimed the whole."<sup>2</sup> "From the peculiar and intimate connection existing between tenants in common of real estate, the proof of an ouster, by one of another of them, ought to be of the most satisfactory nature."<sup>3</sup> "The acts and declarations of the party in possession are to be construed much more strongly against him, than where there is no privity of title."<sup>4</sup> "There must be outward acts of exclusive ownership of an unequivocal character, overt and notorious, and of such a nature as by their own import to impart information and give notice to the cotenants that an adverse possession and an actual disseizin are intended to be asserted against them."<sup>5</sup> "There can be no legal doubt that one tenant in common may disseize another. The only difference between that and the other cases is, that the acts which, if done by a stranger, would *per se* be a disseizin, are, in the case of tenancies in common, susceptible of explanation consistently with the real title. Acts of ownership are not, in tenancies in common,

<sup>1</sup> *Barret v. Coburn*, 3 Met. Ky. 513; *Forward v. Deetz*, 32 Pa. St. 72.

<sup>2</sup> *Newell v. Woodruff*, 30 Conn. 498.

<sup>3</sup> *Adam v. Ames Iron Co.*, 24 Conn. 235.

<sup>4</sup> *Baily v. Trammell*, 27 Tex. 328.

<sup>5</sup> *Warfield v. Lindell*, 38 Mo. 581. See same-case in 30 Mo. 283.

necessarily acts of disseizin. It depends on the intent with which they are done."<sup>1</sup>

§ 222. **The burden of proving an ouster always** devolves upon the cotenant who asserts its existence. If the action be in ejectment, and the fact of ouster be denied by the defendant, the plaintiff must show that he has been ousted before he can prevail. If, on the other hand, the defendant avers the existence of an ouster and a continuous adverse holding for a time sufficient to bar the plaintiff's remedy by operation of the Statute of Limitations, the burden of proving such ouster is shifted from the plaintiff to the defendant. *Prima facie*, the possession of every cotenant is presumed to be by virtue of his title, and not in hostility to the rights of his cotenants. Whoever seeks to assert a remedy, to the granting of which the fact of ouster is a prerequisite, must first remove this *prima facie* presumption. "The law will not presume, without evidence, that any man intends to do an unlawful act, but will presume that every man, having a right of entry or possession, enters or occupies according to his title."<sup>2</sup> But in order to throw upon plaintiff the onus of establishing that the possession of the defendant is hostile, the latter must show that he is a cotenant with the plaintiff. This rule is applicable whether the declaration proceeds upon the theory that the plaintiff is the sole owner, or upon the theory that he is the owner of a specified undivided interest. It does not follow necessarily, nor will any *prima facie* presumption be indulged, that because plaintiff is entitled to one moiety, the defendant is entitled to the other. But when the defendant proves his cotenancy with plaintiff, the presumption of law arises that the possession is not adverse; and the plaintiff must then overcome this presumption before he can recover.<sup>3</sup>

§ 223. **Adverse Entry.**—The difficulty of determining whether a given state of facts constitutes an ouster of one cotenant by another may be removed by circumstances or dec-

<sup>1</sup> Prescott v. Nevers, 4 Mason C. C. 330; Thornton v. York Bank, 45 Me. 161.

<sup>2</sup> Van Bibber's Lessee v. Frazier, 17 Md. 443; Berthold v. Fox, 13 Minn. 507.

<sup>3</sup> Gillett v. Stanley, 1 Hill, 127; Sharp v. Ingraham, 4 Hill, 116; Sigler v. Van Riper, 10 Wend. 419; Arnot v. Beadle, Hill & Denio, 181.



larations from which the true intent of the party is clearly manifested. If the intent in the mind of the tenant making or resisting an entry is to take or retain the property as his own, and this intent is so clearly manifested by him as to be known to the other co-owners, or as to be noticed by persons of ordinary diligence in attending to their own interests, then there is no longer any reason to presume that the entry was in harmony with the rights of the cotenants, and it must be conceded that an ouster has been committed. "Although the entry of one is, generally speaking, the entry of both, yet if he enter claiming the whole to himself, it will be adverse."<sup>1</sup>

§ 224. The character of an entry may be inferred from the conveyance under which it is made, as well as established by direct declarations of the party making it. The entry of a person under a conveyance which purports to convey a moiety may well be presumed to be simply as claimant of such moiety. But when the conveyance purports to dispose of the whole, should not the entry be presumed to be in the assertion of a right in severalty? Should not such entry be, of itself, sufficient evidence that the grantee intended thereby to assert all the rights with which his grantor has assumed the authority to invest him? In other words, is not an entry under a conveyance which purports to convey the entirety, equivalent to an express declaration on the part of the grantee that he enters "claiming the whole to himself;" and is it not, therefore, such a disseizin as sets the Statute of Limitations in motion in favor of such grantee? The answers made to these questions are irreconcilable. But a decided majority of them are certainly in the affirmative.<sup>2</sup> Judge Story, in the case of *Prescott v. Nevers*,<sup>3</sup> says: "I take the principle of law

<sup>1</sup> *Lodge v. Patterson*, 3 Watts, 77; *Ashley v. Rector*, 20 Ark. 359; *Shumway v. Holbrook*, 1 Pick. 117; *Clymer's Lessee v. Dawkins*, 3 How. U. S. 689; *Daniel v. Woodroffe*, 2 H. L. Cas. 832; *Caperton v. Gregory*, 11 Gratt. 508.

<sup>2</sup> *Nelson v. Davis*, 35 Ind. 483; *Clark v. Vaughan*, 3 Conn. 191; *Horne v. Howell*, 46 Ga. 9; *Gill v. Fauntleroy's Heirs*, 8 B. Monr. 186; *Long v. Stapp*, 49 Mo. 506; *Gray v. Bates*, 3 Strob. 500; *Bogardus v. Trinity Church*, 4 Paige, 178; *Bigelow v. Jones*, 10 Pick. 162; *Goewey v. Urig*, 18 Ill. 242; *Hinkley v. Greene*, 52 Ill. 230, 233; *Clapp v. Bromagham*, 9 Cow. 530; *Bradstreet v. Huntington*, 5 Pet. 445; *Clymer's Lessee v. Dawkins*, 3 How. U. S. 689; *Townsend & Pastor's Case*, 4 Leon. 32; *Reed v. Taylor*, 5 Barn. & Ad. 575; *Parker v. The Proprietors*, 3 Met. 101; *Alexander v. Kennedy*, 19 Tex. 496; *Cain v. Furlow*, 47 Geo. 674; *Long v. Stapp*, 49 Mo. 506.

<sup>3</sup> 4 Mason, C. C. 330.



to be clear, that where a person enters into land under a claim of title thereto by a recorded deed, his entry and possession are referred to such title; and that he is deemed to have a seizin of the land coëxtensive with the boundaries stated in his deed, where there is no open adverse possession of the land so described in any other person." In an early case in New York, a conveyance had been made by V for a whole lot. But it appeared that the grantor, instead of being entitled to the whole property as sole heir, as was supposed at the making of the deed, was only one of the heirs. The Court held that this did not change the entry nor control the possession of the grantee, so as to render it an entry and possession as a tenant in common.<sup>1</sup> So in Pennsylvania, the broad proposition is maintained that the possession of land by a purchaser "under a deed of an entire lot, is adverse to the rightful owner, though tenant in common with the grantor,"<sup>2</sup> because "the entry is under an adverse title and not as cotenant."<sup>3</sup> "The sale, in such case, of the whole tract, is in effect such assertion of claim to the whole as cannot be mistaken, because it is wholly incompatible with an admission that the other tenant in common has any right whatever."<sup>4</sup> If the conveyance made by a tenant in common, in addition to purporting to dispose of the entirety, contains a covenant of general warranty against the claims of all persons, no room is left for a doubt that the grantor intended to deal with the lands as his individual estate, and that the grantee believed he was acquiring an estate in severalty. The entry of the grantee cannot be presumed to be that of a cotenant, nor in subordination of the rights of the cotenancy. Acts of ownership on the part of such a grantee must necessarily be adverse to any other part owner. His possession taken under such deed, and continuing the requisite period of time, creates in him a complete title in severalty, by virtue of the Statute of Limitations.<sup>5</sup> "When one tenant in common conveys the whole

<sup>1</sup> *Jackson v. Smith*, 13 Johns. 411.

<sup>2</sup> *Culler v. Motzer*, 13 Serg. & R. 358.

<sup>3</sup> *Dikeman v. Parrish*, 6 Pa. St. 225.

<sup>4</sup> *Law v. Patterson*, 1 Watts & S. 191.

<sup>5</sup> *Thomas v. Pickering*, 13 Me. 337; *Marcy v. Marcy*, 6 Met. 371; *Wright v. Saddler*, 20 N. Y. 329.

estate in fee, with covenants of seizin and warranty, and his grantee enters, and claims and holds exclusive possession, the entry and claim must be deemed adverse to the title and possession of the cotenant, and amount to a disseizin."<sup>1</sup>

§ 225. On the other hand are a few authorities, directly in conflict with the theory that the entry of one who is a part owner only, should be regarded as hostile to the other owners, merely because he enters under a conveyance of the whole. These authorities probably rest upon the idea that the grantee knows, or should know, the true state of the title, and that the other owners have the right to assume that his entry is in accordance with his title, and not coëxtensive with the pretensions of his deed. But in some instances, the doctrine which we have stated in the preceding section, and there supported by quite an array of authorities, has been denied with an assumption of confidence which, to whatever cause attributable, could not have resulted from an examination of the reported adjudications on the subject. In the case of *Seaton v. Son*,<sup>2</sup> it appeared that one Brophy entered into the possession of a lot under a deed for the whole, and believing that this deed did in truth convey the whole. Commenting upon this, the Supreme Court, by Rhodes, J. said: "His entry under the deed executed to him, and his belief at the time that the deed conveyed the entire title, followed by his exclusive actual possession, did not amount to an ouster of his cotenant. As between tenants in common, adverse possession begins with an actual ouster. Nothing short of an actual ouster will sever the unity of possession." And in another case, and in a different Court, the broad statement is made that "it has never been considered that a conveyance by one joint-tenant, or tenant in common, of all his interest in real estate, though the land is described in such a manner as to pass the whole under the deed, if the grantor had owned the whole, is notice of itself to the other joint owner of such *exclusive* claim to the land, as to oust him of his legal seizin in the land. He has the right to suppose that by such a deed both the grantor and the grantee understand it to con-

<sup>1</sup> *Kittredge v. Locks*, 17 Pick. 247.

<sup>2</sup> 32 Cal. 461.

vey the real interest the grantor owns in the land.”<sup>1</sup> The above language seems to point to a distinction between a deed which on its face assumes to convey *the land*, and one which, without making such an assumption, is nevertheless sufficient to convey a title in severalty, if such the grantor had, because it purports to convey *all his interest* in the land. Such a distinction is not without foundation in reason and in authority.<sup>2</sup> One who assumes to convey *his interest* without specifying its extent, instead of asserting his title to be perfect and in severalty, seems to put the purchaser on his guard, and to direct him to inquire concerning the nature and extent of his acquisition. Such a grantee in entering may be presumed to enter not as sole owner, but as succeeding to the true interest of his grantor, for that is all with which the deed purports to deal. The case decided in California is based on no such distinction. It states an unqualified proposition of law, and must therefore be considered as in direct conflict with the authorities—as unsustained and unsustainable. What a marked contrast exists between the declaration so confidently made in California, and the one made, with equal confidence, and in the following language, by the Supreme Court of Tennessee: “It seems to be well settled in this State and elsewhere, that if one tenant in common assume to convey the entire land, or any specific part of it, by metes and bounds, his deed will be color of title; and possession under it for seven years will be adverse to the right and title of the cotenants, and bar their action to recover the land conveyed. It is an actual ouster and disseizin of the cotenant, which he is bound to notice; and in order to create this adverse relation, no formal or other notice from the vendee in possession is necessary.”<sup>3</sup>

§ 226. But a conveyance alone, without possession taken under it, can never amount to an ouster.<sup>4</sup> The same remark is applicable to a mortgage of the whole. If such

<sup>1</sup> Roberts v. Morgan, 30 Vt. 324.

<sup>2</sup> Edwards v. Bishop, 4 N. Y. 64; Lefavour v. Homan, 3 Allen, 356; Purcell v. Wilson, 4 Gratt. 21.

<sup>3</sup> Weisinger v. Murphy, 2 Head, 679; citing Waterhouse v. Martin, Peck, 392, 411; Higbee v. Rice, 5 Mass. 352.

<sup>4</sup> Hannon v. Hannah, 9 Gratt. 152.

mortgage can have any relevancy in determining whether the mortgagor had been guilty of an ouster, it must be in connection with other circumstances, tending to show an intent to hold the property adversely.<sup>1</sup>

§ 227. **Possession taken under a decree purporting to be a partition of the lands therein described, and setting off to persons therein named different tracts in severalty, is, even more conclusively than taking possession under a conveyance in severalty, an act of ouster.** In fact, it seems to be regarded as sufficient evidence of an ouster, and as notice of the existence of such ouster to all persons whose interests are imperiled by it.<sup>2</sup> “Inasmuch as such partition is a notorious act of ouster,” an entry made under it claiming the whole of the land “would, on general principles, as against a citizen not laboring under a disability, operate as the commencement of a prescription in favor of all who held adversely under such decree; and possession under it, accompanied with the circumstances enumerated in the statute, would ripen into a bar against a joint owner thus disseized.”<sup>3</sup>

§ 228. **An exclusive possession of a part of the common estate is, to the extent of land embraced by it, as inconsistent with the common title as the occupation of the whole would be.** “Whether any given act will amount to an ouster, must depend upon whether the act is or is not consistent with the common title; that is, consistent with the common right to occupy and enjoy, for, beyond that, there is, as to tenancies in common, no common title. This generalization is advanced as a test by which to determine whether a tenant has or has not been ousted as the result of any given act; and we accept the test as generally correct. It follows, then, that whether the exclusion of one tenant by another is from the whole land, or only from a part of it, is a matter of entire indifference; for the partial exclusion no more consists with the common right to occupy than the total exclusion. The act done, in the one case, is of the same essential character as the act done

<sup>1</sup> *Leach v. Beattles*, 83 Vt. 198; *Wilson v. Callishaw*, 13 Pa. St. 276; *Moore v. Callishaw*, 10 Pa. St. 227; *Hodgdon v. Shannon*, 44 N. H. 577.

<sup>2</sup> *Clymer's Lessee v. Dawkins*, 3 How. U. S. 688.

<sup>3</sup> *Cryer v. Andrews*, 11 Tex. 181.

in the other. In both cases, the result reached is the same—tortious exclusion—and the only difference between the cases is, that in one the wrong is more extended than in the other. But that difference lies in circumstance and not in principle; and it follows, by the very point of the agreed test, that an ouster of a part of the common land by one tenant in common of another is legally possible.”<sup>1</sup>

§ 229. **Notice of Ouster.**—When a possession has once been held or taken, *eo nomine*, as a tenant in common with others, it may afterwards become adverse. When rights dependent upon such adverse possession are claimed to have accrued, so that the cotenants out of actual possession are barred of their legal remedy to recover possession, the question arises, Did these cotenants, against whom the adverse possession is asserted, have sufficient notice of its hostile character? For it is obvious that when lands are once held by a cotenant for his companions as well as for himself, they have the right to presume that his continued possession is also for their common benefit, unless they have some notice of a change in its character. If this were not so, the tenant in possession could be obtaining a title in severalty through the operation of the Statute of Limitations, while his cotenants had no reason for suspecting that their rights were either denied or imperiled. Shocked by the thought that a cotenant so in possession should thereby obtain and enforce an unconscientious advantage over his companions in interest, the Courts have sometimes announced doctrines which would seem to negative the possibility of a friendly possession changing to a hostile one in the absence of expressed notice. A husband, on the death of his wife, remained in possession of their common property. By the Mexican law, under which the property was acquired, he was entitled to one-half, and the heirs of the wife were entitled to the other half. After his death, the question arose as to whether he had not been in possession of the property adversely to the heirs; but the Court said: “The deceased was holding the property, in presumption of law, as well for the heirs as for himself. They were tenants in common with him in it: his

<sup>1</sup> *Carpentier v. Webster*, 27 Cal. 549.

possession was their possession; and he could not, merely by his act of control or dominion, as of his own property, however unequivocal, change the title and tenure, unless such acts and claims were brought directly to the knowledge of the heirs, and they assented or acquiesced.”<sup>1</sup> So the Supreme Court of the State of Georgia has laid down the general proposition that “a possession that in its commencement is not adverse to the title of the true owner, can only become adverse to that title in one way: the holder must change his mind and *intend* to hold adversely, and *knowledge or notice* of this intention must come to the true owner.”<sup>2</sup> In Vermont, possession was taken by the grantee in a quit claim deed for the whole premises. He entered claiming title to the whole; and many years subsequently, claimed the benefit of this entry as an ouster of Sutherland, the other part owner. “This,” said the Court, “probably was an act which Sutherland might have elected to treat as an *ouster*, and have thereupon brought and maintained an action of ejectment, without other proof of any ouster, and without making any demand to be let into possession of his share. But we do not consider that this alone would be such an ouster as would bar a joint owner of his rights, unless he commenced his action within fifteen years thereafter. Another element is necessary in order to make it sufficient to found an adverse holding upon, and that is notice of such exclusive and hostile claim, to the joint owner out of possession. When one joint owner is in possession of the whole, the legal presumption is that he is keeping possession, not only for himself, but for his cotenants, according to their several interests, and the other joint owners have the right to so understand, until they have notice to the contrary; and the statute would only run from the time of such notice. We consider the principle substantially the same as between landlord and tenant as to converting a mere fiduciary possession into an adverse or hostile one.”<sup>3</sup> This opinion was subsequently reaffirmed in the same Court, when it was further stated that: “There can be no doubt that the notice should

<sup>1</sup> Ord v. De La Guerra, 18 Cal. 75.

<sup>2</sup> Lawson v. Cunningham, 21 Ga. 459.

<sup>3</sup> Roberts v. Morgan, 30 Vt. 324.

be sufficiently explicit to give the cotenant, against whom such adverse and hostile claim is made, to understand that the tenant making such claim will no longer keep possession for his cotenant, and to impose upon the cotenant the necessity of protecting his interests by that measure of diligence which the Statute of Limitations requires."<sup>1</sup>

§ 230. **Notice of Ouster continued.**—The general language employed in the decisions cited in the preceding section very strongly tends to establish the broad proposition that no ouster can be sufficient to set the Statute of Limitations in motion unless it is shown to have been brought home to *the knowledge* of the cotenant against whose rights it has been committed. But in other cases, and supported as we think by sound reasoning, a distinction is made between an alleged ouster resting upon open, visible, and notorious acts, and an ouster predicated upon a mere denial of the cotenant's rights, or upon some act not of so notorious a nature as to be evident to every person evincing any considerable interest in the subject of the tenancy. This distinction was very well stated and supported by Napton, J. in delivering the opinion of the Supreme Court of the State of Missouri: "To constitute an adverse possession of one tenant in common against his cotenants, there must be some notorious act asserting an entire ownership. It is further said, in some cases, that this act must be brought home to the knowledge of the cotenant. This, we suppose, depends upon the nature of the act. If it consists altogether of a mere verbal assertion of entire ownership, such an assertion could not, with any propriety, be regarded as an act of adverse possession of which the cotenant was bound to take notice, unless made to him, or communicated to him. A declaration to a mere stranger amounts to nothing, unless that declaration is brought to the knowledge of the cotenant. But when the act is of such a nature as the law will presume to be noticed by persons of ordinary diligence in attending to their own interests, and of such an unequivocal character as not to be easily misunderstood, it is not believed to be necessary that any positive notice should

<sup>1</sup> Holley v. Hawley, 39 Vt. 534.



be given to the cotenant, or that it devolves upon the possessor to prove a probable actual knowledge on the part of the cotenant. It is sufficient that the act itself is *overt, notorious*; and if the cotenant is ignorant of his rights or neglects them, he must bear the consequences."<sup>1</sup> The conclusion here announced seems to be fully supported by a decision in Pennsylvania, in the course of which it was said that: "The character of adverse possession is given, not by proving notice to persons interested, but by the nature of the acts done by the party. There must be a hostile intent, and that intent must be manifested by outward acts of an unequivocal kind. To constitute a disseizin, it was never held to be requisite that notice should be given to the disseizee, or that he had knowledge of the entry and ouster committed on his land. The open act of entry on the land, with the declared intent to disseize, constitute the disseizin."<sup>2</sup> In a subsequent case in the same State, the proposition was affirmed that: "In order to prove that one tenant in common has *claimed the whole exclusively*, it is not requisite that he should be proved to have made an express declaration to that effect; for it may be shown as clearly from his acts as from his words. For this purpose, it will be sufficient to show that he entered upon the whole of the land and took the possession thereof as if it had been his own exclusively; and that he has continued to occupy the whole, either by himself or his tenants, and to receive the rents, issues, and profits of the same, for twenty-one years, without having accounted to his cotenant for any portion thereof, or any demand being shown to have been made on him to do so, or evidence given of his having acknowledged the claim of his cotenant."<sup>3</sup>

§ 231. **Difference between Ouster as a Defense and as a Cause of Action.**—According to the view of the law taken by the highest court in Connecticut, no ouster can exist so as to authorize an action of ejectment by one tenant in common against another, unless there has been an actual tortious ex-

<sup>1</sup> Warfield v. Lindell, 30 Mo. 282. See same case, 38 Mo. 578. Reaffirmed in Lapeyre v. Paul, 47 Mo. 590.

<sup>2</sup> Lodge v. Patterson, 3 Watts, 77. See also Alexander v. Kennedy, 19 Tex. 492.

<sup>3</sup> Law v. Patterson, 1 Watts & S. 191.



pulsion, or the defendant has refused, upon demand, to permit the plaintiff to enter into the common possession and enjoyment of the premises. It is not enough that the defendant is in possession of the whole, claiming every part as owner in severalty, and having no knowledge of the invalidity of such claim. The reasoning by which this position was maintained was that ouster is necessarily dependent upon an intent to oust; that "actual *intent* implies actual *knowledge*, and there can be no wrongful dispossession or wrongful exclusion, no adverse intent and adverse holding, where one is in the enjoyment of what he honestly supposes to be his, and has no knowledge that any person has, or claims to have, a right to participate in the possession of it. A person who has received, by inheritance from his father, an estate, and is in the enjoyment of it, is in one sense holding adversely to all the world; but not in the sense in which the term is used in the law of disseizin. He has done and is doing no wrongful act. He has not dispossessed any one, and is not wrongfully excluding any one of whose right or claim he has any knowledge. He is not guilty of any wrongful intent. *Non constat*, if any one has any right, or claims to have any, but that if apprised of the claim in a reasonable and proper manner, he will admit it. He is honestly in the enjoyment of an apparent clear right; he knows of no other right to which he should yield, and is conscious of no duty unperformed. Before such a man can be subjected to the cost and damage demanded in an action of disseizin, it is just that the demandant should apprise him with reasonable precision of the nature of his claim, and give him reasonable opportunity to determine his duty and form his intent. So are all the analogies of the law, and less than that would be a reproach to it. Without that, in such a case, there can be no sufficient evidence of an ouster."<sup>1</sup> If the foregoing decision can be accepted as a correct exposition of the law, it follows that acts sufficient to establish an ouster when proved as a *defense* are insufficient when proved as a *cause of action*. Take, as an illustration, the case of an exclusive occupancy, under a claim of ownership in severalty, accompanied with the occupant's belief that

<sup>1</sup> Newell v. Woodruff, 30 Conn. 493.

his claim is unquestioned and unquestionable. If he be sued in ejectment by a cotenant, the latter cannot recover, in the absence of a demand for possession, because there *is no ouster*. But if the possession has continued for a length of time sufficient to create a title by disseizin, then the plaintiff would not be able to recover, because, from such possession, the jury would be justified in *finding an ouster*. Nor is there any reason why a cotenant in possession, intending to hold for himself alone, should be entitled to have a demand made on him for possession, which does not apply with equal force where the demandant is owner in severalty. No doubt, instances have occurred where an occupant believed he had a perfect title, and yet had none. And no doubt, if the worthlessness of his own title had been clearly shown to him, he might have given up possession without waiting to the end of costly and hopeless litigation. His innocence in regard to the relative value of his own title and that of the demandant may make it seem equitable that he should be apprised "with reasonable precision of the nature of his claim, and given reasonable opportunity to determine his duty and form his intent." But the law does not consider his ignorance. He is as liable to the costs of an action for possession as though he knew in advance that his title would be adjudged invalid. If a defendant may lose the *whole* of his property, and be, in addition, made responsible for the costs of the action, we cannot see that a defendant who may lose but *a part* should receive any better treatment; provided that in both cases the possession was sufficiently hostile as, when continued for the requisite time, to ripen into a perfect title by disseizin.

§ 232. **Is a question for the Jury.**—The cases which present the greatest difficulty in determining whether one cotenant has been ousted by another are those in which the original entry was apparently or confessedly that of a cotenant, or was at least not made in any such a manner as pointed to a denial of the rights of his companions in interest. In such cases, as there is nothing to give notice that the entry was hostile, in order to show that a subsequent possession became adverse, a state of facts must be proved from which an actual ouster is directly established, or from which such

ouster may be inferred. The question of ouster is always a question of fact to be determined by the jury.<sup>1</sup> It would be difficult to find any instance in which this question was involved in sufficient doubt to give rise to a controversy at law, and in which the facts constituting the alleged disseizin were of so decisive a character, that the Court could say, as a matter of law, that they did amount to an ouster. But nevertheless there are many decisions on this subject which enable us to determine, as well as we can determine any question of fact, what, as between cotenants, does or does not constitute an ouster.

§ 233. **Jury must find Ouster in express terms.**—Where an issue is found upon the question of ouster, the finding of the jury to sustain a judgment in favor of the litigant on whom the burden of establishing the ouster rests, must show that they have *determined* that such ouster was committed. It is not enough that a special verdict finds a state of *facts* from which the jury would have been amply justified in finding an ouster. In a case decided in the Supreme Court of California, the special verdict of the jury found that defendants were in sole possession, that plaintiff had demanded to be let into possession with them, and that they refused to comply with such demand. In considering this finding, the Court said: “The trouble with the verdict is, that it does not find an ouster, either in terms or by legal conclusion. A demand is found, and a refusal matching the demand; but ‘demand and refusal’ does not fall within any definition of ‘ouster’ as that term is used in the law governing the relation of tenants in common. Neither acts of ownership by one tenant in common, nor refusal to allow cotenants to enter, necessarily work a disseizin. The law will not presume from either the one or the other, nor from both combined, that there was an intent to oust. That intent must be established as a fact by the finding of the jury. Conversion is one of the points to be established in actions of trover; but it is settled that ‘demand and refusal’ is not conversion, but only evidence of it for the consideration of the jury. In the absence of all explanation, the Court

<sup>1</sup> Harmon v. James, 7 Smedes & M. 119; Purcell v. Wilson, 4 Gratt. 22; Carpentier v. Mendenhall, 28 Cal. 486; Cummings v. Wyman, 10 Mass. 468.

would be justified in directing or advising the jury to infer an ouster in a case like the one at bar, from the fact of demand and refusal; but the inference is to be made by the jury, and not by the Court."<sup>1</sup>

§ 234. **Manual force, when actually applied to the expulsion or to the exclusion of a cotenant, gives so unmistakable a character to the transaction, that the question as to whether an ouster has been committed admits of no debate. But the absence of proof of the application of such force never conclusively negatives the existence of an ouster.<sup>2</sup> An actual ouster does not necessarily mean an act accompanied by real force. No turning out by the shoulders is necessary.<sup>3</sup> As in the absence of evidence of the use of force, there may still be an ouster, we shall proceed to consider: 1st, what acts other than the employment of force are sufficient to justify a jury in inferring an ouster; 2d, what acts are not sufficient to justify a jury in such inference.**

§ 235. **The denial of a right of a cotenant made to him directly, or brought to his knowledge, is, when accompanied by the exclusive possession, sufficient to warrant a finding of an ouster.<sup>4</sup> But such denial may be by acts as well as by declarations. The assertion by one in possession that he is sole owner, and his selling or offering or contracting to sell as owner in severalty, are equivalent to an express denial.<sup>5</sup> A mere refusal to pay rent is not a denial of the title of the cotenant,<sup>6</sup> unless such refusal is accompanied with a claim of title on the part of the tenant in possession.<sup>7</sup> "One tenant in common in possession *claiming* the *whole*, and denying possession to the other, is beyond the mere act of *receiving* the whole rent, which is equivocal. This was certainly evidence of an ouster of his companion."<sup>8</sup> "The moment**

<sup>1</sup> *Carpentier v. Mendenhall*, 28 Cal. 486.

<sup>2</sup> *Sigler v. Van Riper*, 10 Wend. 420; *Manchester v. Doddridge*, 3 Ind. 363; *Corbin v. Cannon*, 81 Miss. 573; *Warfield v. Lindell*, 30 Mo. 281; *Jefcoat v. Knotts*, 13 Rich. 50; *Carpentier v. Gardiner*, 29 Cal. 160.

<sup>3</sup> *Doe v. Prosser*, Cowper, 217.

<sup>4</sup> *Sigler v. Van Riper*, 10 Wend. 419; *Humbert v. Trinity Church*, 24 Wend. 604.

<sup>5</sup> *Valentine v. Northrop*, 12 Wend. 495; *Carpenter v. Thayer*, 15 Vt. 556.

<sup>6</sup> *Doe v. Prosser*, Cowp. 217.

<sup>7</sup> *Phillips v. Gregg*, 10 Watts, 158.

<sup>8</sup> *Hellings v. Bird*, 11 East, 50.

either denies the title of his cotenant and gives notice of it, the possession is adverse, and if continued without action or entry for twenty-one years, is a valid title to the land, to the extent of the claim so made, if accompanied with actual, exclusive possession."<sup>1</sup> But the assertion of the party in possession, that he claims as an owner in fee, is not equivalent to an assertion of ownership in severalty. As a part owner, he is an owner in fee of every part and parcel of the premises. His claim is therefore in accordance with his title, and not inconsistent with the admission of an equal right in another.<sup>2</sup> A denial of a cotenant's title must, in order to render the cotenant in possession liable for an ouster, be of a clear and unequivocal character. If he merely admits the fact of possession, and adds that "it is hard to pay for the land twice," this is rather an "ejaculation of regret" than an unequivocal denial of demandant's title.<sup>3</sup>

§ 236. A refusal by one in possession "to let his cotenant come in, or to participate in the enjoyment of the common property, is equivalent to turning him out."<sup>4</sup> Of course, this rule applies only to real estate; for a tenant in common in possession of a chattel is under no obligation to allow his cotenant to participate in such possession.<sup>5</sup> A statement made to demandant that he cannot have possession unless he obtains it at law, is a sufficient ouster to entitle him to an action of ejectment.<sup>6</sup> "The authorities are decisive, that when the cotenant makes a proper demand, not for his share of the rents and profits, but to be let into possession, and the request is refused, and the tenant upon whom the demand is made continues in possession thereafter, such possession will be considered as adverse, even though there was no formal denial of title."<sup>7</sup>

§ 237. A demand made by a cotenant out of possession on a cotenant in possession, which informs the latter that the

<sup>1</sup> Longwell v. Bentley, 3 Grant's Cas. 177.

<sup>2</sup> Edwards v. Bishop, 4 N. Y. 64.

<sup>3</sup> Colburn v. Mason, 25 Me. 435.

<sup>4</sup> Roberts v. Moore, 3 Wall. Jr. 297.

<sup>5</sup> Cotten v. Thompson, 25 Ala. 679.

<sup>6</sup> Gordon v. Pearson, 1 Mass. 335; Allen v. Hall, 1 McCord, 132.

<sup>7</sup> Carpentier v. Webster, 27 Cal. 562.

former is the "principal owner of certain lands, and that he demands to be let into the immediate possession and enjoyment of the same and every part and parcel thereof," is a sufficient demand. The words "to be let into possession," used between tenants in common, are not equivalent to a notice to quit, nor to a claim of the right to an exclusive occupancy, because the demand may be fully acceded to without relinquishing the rights of the tenant in possession.<sup>1</sup>

§ 238. The receipt, for a long period of time, of all the rents and profits of a tract of land, is a fact which may properly be admitted in evidence before the jury to assist them in determining whether there has been an ouster. Such a receipt is said to raise not a legal but a natural presumption of an ouster, "passing with the jury for what it is worth, and operating no further than it happens to produce actual conviction of the fact as it was allowed to in *Nickle v. McFarlane*, 3 Watts, 167."<sup>2</sup> The exclusive receipt of rents and profits cannot alone be taken as conclusive evidence of an ouster.<sup>3</sup> But if this receipt be "under a claim of exclusive right, or with a manifest intent to possess the whole exclusively, it is equivalent in law to an ouster of his cotenant."<sup>4</sup>

§ 239. Going upon land and cutting timber standing thereon, at occasional intervals extending over a long period of time, is not a disseizin of the owner. Hence the fact that one cotenant has so entered upon the common lands and cut and taken timber therefrom, can never establish a title by disseizin against the other cotenants.<sup>5</sup>

§ 240. Building Permanent Structure.—It is said that such "an exclusive appropriation by one cotenant of a part of the land to his own use" as arises "from the erection of a permanent structure, would be evidence of an ouster."<sup>6</sup> An exclusive occupation of part of the land for a temporary pur-

<sup>1</sup> *Carpentier v. Webster*, 27 Cal. 568.

<sup>2</sup> *Bolton v. Hamilton*, 2 Watts & S. 299.

<sup>3</sup> *Catlin v. Kidder*, 7 Vt. 14; *Willison v. Watkins*, 3 Pet. 51; *Johnson v. Toulmin*, 18 Ala. 54; *Chambers v. Chambers*, 3 Hawks, 232, *Allen v. Hall*, 1 McCord, 192.

<sup>4</sup> *Doe v. Prosser*, Cowp. 217; *Owen v. Morton*, 24 Cal. 376.

<sup>5</sup> *Ewer v. Lovell*, 9 Gray, 277; *Peck v. Ward*, 18 Pa. St. 508.

<sup>6</sup> *Bennett v. Clemence*, 6 Allen, 18.

pose, such as piling boards and lumber, is not an ouster.<sup>1</sup> And while we have the general language, quoted above, stating that the erection of a permanent structure "would be evidence of an ouster," we are at a loss to know what degree of importance should be attached to such evidence. It may be that the fact of the erection, out of his own means, of a house or other permanent structure, would be a material circumstance to be considered in connection with other facts, for the purpose of determining whether the cotenant making the erection was holding the premises for himself alone, or for the other cotenants as well as for himself. But as long as it is conceded that each cotenant may enter upon, and enjoy the common property, we shall not be inclined to admit that evidence of the erection of a permanent structure can be sufficient to justify a finding of ouster. It may be that the lands cannot be enjoyed as each tenant is entitled to enjoy them, without making extensive and permanent improvements. Why should the cotenant, willing to be at the expense of such improvements, be compelled to desist from making them, and required to leave his lands in a condition in which he cannot use them advantageously to himself? for he is necessarily so compelled and required, if his improvements are to be treated as hostile acts, subjecting him to the penalties visited upon a cotenant found guilty of an ouster of his companion in interest.

§ 241. **Unequivocal Acts essential to Ouster.**—The inference of law in regard to possession of a tract of land held by any person, is that such possession is by virtue of the title which such person happens to have. If he be a part owner, the presumption of law must necessarily be that he enters as such part owner, intending, while enforcing his own rights, to respect those of his cotenants. The fact of his possession is, of itself, in harmony with his title. Until, by some act of an unequivocal character, he indicates that his possession is no longer the possession of his cotenants as well as of himself, he is not liable to be proceeded against for having committed an ouster, nor can he claim to have acquired any rights against

<sup>1</sup> Keay v. Goodwin, 16 Mass. 1.



them based upon their disseizin.<sup>1</sup> “In the cases in which one tenant in common has successfully asserted the statute against his cotenants, there have been unequivocal acts, such as resistance of the right of entry; confession of disseizin; selling, leasing, or improving the premises, or part of them.”<sup>2</sup>

§ 242. **Ouster, from what inferred.**—From what we have said in regard to the necessity of the existence of some act of an unequivocal nature, in order to impart to the possession of a cotenant such a hostile character as to convert it into an ouster, it must not be assumed that direct evidence of such act must always be produced. When an issue arises in regard to an alleged ouster, certain acts and circumstances may be put in evidence, which, though they do not establish a direct keeping or turning out, nor an express denial of title, yet tend to create “a natural presumption of an ouster,” and to force upon the minds of the jury the conviction that an actual ouster must have taken place. “If one tenant in common has been in possession a great number of years, without any accounting to his fellow-commoners, this is proper evidence, from which the jury may infer an adverse possession.”<sup>3</sup> In some instances, such possession has been regarded as raising a presumption of law which the jury are not at liberty to resist.<sup>4</sup> An exclusive possession under a claim of title for forty years, while the other cotenants resided in the same county and failed to assert any claim to their property, warrants the presumption of an actual ouster.<sup>5</sup> “When one tenant in common enters on the whole, and takes the profits of the whole, and *claims the whole exclusively* for twenty-one years, the jury ought to *presume* an actual ouster though none be proved.”<sup>6</sup> “It is necessary, in order to maintain a title by disseizin by one tenant in common against another, to show some act or series of acts to indicate a de-

<sup>1</sup> Van Bibber v. Frazier, 17 Md. 450; Wass v. Bucknam, 38 Me. 360; Challefoux v. Ducharme, 8 Wis. 287; 4 Wis. 554; Marr v. Gilliam, 1 Cold. 488; Blakeney v. Ferguson, 20 Ark. 547; McClung v. Ross, 5 Wheat. 116.

<sup>2</sup> Tulloch v. Worrall, 49 Pa. St. 140.

<sup>3</sup> Bryan v. Atwater, 5 Day, 188.

<sup>4</sup> Van Dych v. Van Buren, 1 Caines, 84.

<sup>5</sup> Jackson v. Whitbeck, 6 Cow. 633.

<sup>6</sup> Frederick v. Gray, 10 Serg. & R. 188.



cisive intent and purpose to occupy the premises to the exclusion and in denial of the right of the other. The facts which will sufficiently prove such ouster and adverse possession will vary according to the different circumstances of parties, and no definite and positive rule can be laid down by which all cases can be governed. It may, however, be safely said that a sole and uninterrupted possession and permanency of the profits by one tenant in common, with the knowledge of the other, continued for a long series of years, without any possession or claim of right and without any perception of profits or demand for them by the cotenant, if unexplained or controlled by any evidence tending to show a reason for such neglect or omission to assert a right, will furnish evidence from which a jury may and ought to infer an actual ouster and adverse possession. Such an inference is reasonable and justified under the circumstances, because men do not ordinarily sleep on their rights for so long a period, and a strong presumption arises that actual proof of the original ouster has become lost by lapse of time.”<sup>1</sup> The facts of a case, and the law applicable thereto, were thus stated in the Supreme Court of Pennsylvania: “One tenant had died in debt to the others, and apparently insolvent. The surviving owners and their representatives, during nearly forty years, paid the taxes and ground rent; for a suspension of these payments would have lost them the whole estate, comparatively worthless then, but valuable now. They mortgaged the property, and placed their mortgage on record. At different times, they erected and re-erected buildings suitable to their business. They received the profits of the land, smaller probably than its expenses, but large in the aggregate, without accounting or being called to account. When the property has become valuable, certain of the dead man’s heirs come forth and recover a proportionate part, without paying a dollar of the expenditures. Considered separately, each of these facts may have been inconclusive; together, they bore powerfully on the result, for if ‘improving lands, and receiving the rents, issues, and profits thereof, are in all cases the highest acts of ownership which can be exercised over them, and the exercise of

<sup>1</sup> *Lefavour v. Homan*, 3 Allen, 355.

these acts strongly marks the possession with exclusiveness and hostility,' the defendant's testimony ought to have given a preponderance to the scale. To tell the jury that perception of profits was insufficient, and that from all the facts in the case they were not bound to presume an ouster, was to fall short of the mark. The facts tending to prove the ouster should have been submitted to the jury for their decision, with the instruction, that if found to be undenied and unexplained, and believed to be true, they would justify the finding of the ouster claimed to have taken place."<sup>1</sup>

Where the proof established an exclusive possession, a taking of the entire profits, and paying of the taxes, for a period extending beyond the Statute of Limitations, with the acquiescence of the other cotenants, and without any claim of possession or any demand for an accounting of rents and profits, the Court thought that this "evidence had no tendency to prove direct acts of actual ouster. It consisted merely of facts and circumstances going to show negligence, inattention, remissness, and failure to claim any right or title, or make any demand for an account of the profits—mere acquiescence on the one side, and a continuous and exclusive possession of the whole premises on the other—taking all the profits and paying the taxes for more than twenty-six years, and for a time beyond the full period of the Statute of Limitations, both as a bar to an ejectment and a bar to an action of account. Upon evidence of this kind, it would have been entirely proper for the Court to instruct the jury that they were at liberty to presume—that is, to infer—an actual ouster, if, upon the whole evidence before them, considered together, with the great lapse of time, they should be morally convinced and satisfied that such had been the fact. Such evidence, in such case, may be allowed to overcome the legal presumption in favor of tenancy in common, and it will be deemed sufficient in law to warrant a jury in inferring and presuming an actual ouster and an adverse possession for the statute bar; and the jury is not bound to find, nor should the Court instruct them to find, such actual ouster. The doctrine goes no further than to leave it to the

<sup>1</sup> Keyser v. Evans, 30 Pa. St. 509.

jury, not upon a legal presumption, but upon a natural presumption, passing for what it may be worth with them, and operating upon the minds as it may happen to produce an actual conviction of the fact."<sup>1</sup>

"The sole enjoyment of property for a great number of years, without claim from another, having right and under no disability to assert it, becomes evidence of a title to such sole enjoyment; and this not because it clearly proves the acquisition of such a right, but because, from the antiquity of the transaction, clear proof cannot well be obtained to ascertain the truth, and public policy forbids a possessor to be disturbed by State claims when the testimony to meet them cannot easily be had."<sup>2</sup> "An exclusive adverse possession of the whole tract of land, or the exclusive receipt of the rents and profits, no demand being made by the other cotenant, or if made refused, and his title denied, may be evidence of a disseizin or actual ouster."<sup>3</sup>

The most extreme position of which we have any knowledge, which has been assumed in regard to the ouster of one cotenant by another, is that exhibited by the following extract from a recent opinion of the Supreme Court of California: "The Court finds that Shepherd, the landlord of the defendants, had been in the actual adverse possession of the demanded premises from the year 1853 to the present time, claiming title adversely to the plaintiffs and all other persons; but that the plaintiffs had made no demand prior to the commencement of the action to be let into the possession, and had made no offer or attempt to take possession. If an ouster can be inferred from these facts, it must rest solely on the ground that Shepherd was in the adverse possession, claiming title adversely to the plaintiffs. It does not appear that the adverse holding and claim of title were open and notorious, nor that the plaintiffs had notice of it. It is therefore unnecessary for us to decide whether, if these facts had appeared, the ouster would have been established, in the absence of a demand by the plaintiffs to be let into the pos-

<sup>1</sup> *Warfield v. Lindell*, 38 Mo. 581.

<sup>2</sup> *Thomas v. Garvan*, 4 Dev. 223; *Cloud v. Webb*, Id. 290.

<sup>3</sup> *Hubbard v. Wood*, 1 Sneed, 286.

session. But it is clear that an adverse holding and claim of title do not, of themselves, constitute an ouster. The tenant, out of possession, has a right to assume that the possession of his cotenant is his possession, until informed to the contrary, either by express notice or by acts and declarations which may possibly be equivalent to notice under certain circumstances. But until he has notice, either actual or constructive, in some form, that the possession of his cotenant has become hostile, it will be deemed in law to have been amicable, notwithstanding the tenant in possession may in fact have been holding adversely. If the rule were otherwise, the tenant out of possession might be disseized and lose his remedy by the bar of the Statute of Limitations, without notice that the possession of his cotenant, which before was amicable, had become hostile. To avoid this injustice, the law deems the possession to have continued amicable until the tenant out of possession has, in some method, been notified that it has become hostile. We are therefore of the opinion that the facts shown by the findings do not establish an ouster."<sup>1</sup>

§ 243. **Possession of Trespasser made Amicable by his becoming Cotenant.**—The presumption that the possession of a part owner of land is not adverse to the other part owners has been held to prevail where such possession, when first acquired, was taken and held without any right or title whatever, and was therefore hostile to the title held by the cotenancy. Thus in one instance, it appeared that possession was taken by parties without any title, and that afterwards some of them acquired an undivided interest in the premises, the Court said: "It is insisted that the verdict finds an ouster of the plaintiff by all the defendants, except Stout, White, and Slanhard, to wit, their unlawful entry upon the premises in September, 1858—a year and a half before the rights of the defendants as tenants in common were acquired. It is said, in support of this position, that the possession acquired in 1858 was by disseizin, and it is added 'that the possession never lost its hostile character;' and it is upon this assump-

<sup>1</sup> *Miller v. Myers*, 46 Cal. 538.

tion of fact that the whole argument turns. But the verdict demonstrates that the possession unlawfully taken in 1858 did lose its hostile character, *prima facie*, on the 9th of March, 1860, when, as the verdict finds, they became tenants in common with the plaintiff. The moment the defendants became tenants in common with the plaintiff, their possession lost its hostile character by the legal effect of the fact, and it cannot be presumed that the possession was otherwise than amicable thereafter, until the contrary is made to appear."<sup>1</sup>

§ 244. **English Statute.**—The common law presumption that the entry and possession of one cotenant was the entry and possession of all, was, as we have stated, liable to be rebutted by showing that the entry was made as a sole owner or as a disseizor, or that, though the entry was made in the character of a cotenant, the possession, at some subsequent period, became adverse and exclusive. The difficulty of determining whether a given state of facts negatived this presumption of law was so insurmountable that no precise rules could be laid down for its solution. The most that the Courts could do in the cases ordinarily coming before them, requiring a finding upon the question of ouster, was to inform the jury that they might consider certain established facts, and if satisfied therefrom of the existence of an ouster, they might so find, though no direct ouster could be proved. In this state of the law no counsel, however sagacious or well informed, could confidently advise his client that an ouster had or had not been committed. Part owners in possession claiming and believing themselves to be owners in severalty, were exposed to the hazard of being called upon, after the lapse of long periods of time, to defend themselves against stale claims to a moiety of their lands; and this, perhaps, when the testimony necessary to rebut such claims could no longer be obtained. On the other hand, cotenants not in actual possession of their lands were exposed to the danger that the possession held by their cotenant, and which to them seemed to be perfectly amicable and entirely consistent with the rights and relations

<sup>1</sup> *Carpentier v. Mendenhall*, 28 Cal. 487. The purchase by defendant, *pendente lite*, of an undivided interest, divests his possession of its hostile character, *prima facie*. *Carpentier v. Small*, 35 Cal. 356; *House v. Fuller*, 13 Vt. 165.

of cotenancy, would be proved to be of a different character, and have attributed to it a different effect, from what they had always expected. We think it was wise, therefore, in Parliament to remove all these doubts and dangers by legislating the presumption itself out of existence, as it did in the following language:

“And be it further enacted, That when any one or more of several persons entitled to any Land or Rent as Coparceners, Joint Tenants, or Tenants in Common, shall have been in Possession or Receipt of the Entirety, or more than his or their undivided Share or Shares of such Land or the profits thereof, or of such Rent, for his or their own Benefit, or for the Benefit of any Person or Persons other than the Person or Persons entitled to the other Share or Shares of the same Land or Rent, such Possession or Receipt shall not be deemed to have been the Possession or Receipt of or by such last mentioned Person or Persons or any of them.”<sup>1</sup>

<sup>1</sup> Sec. 12, Ch. 27 of 3 and 4 Will. 4. This act was recommended by the Real Property Commissioners, and was brought in by Lord Brougham, (*Daniel v. Woodroffe*, 2 H. L. Cas. 834.) This statute was given a retrospective operation, (see 2 H. L. Cas. 833; *Culley v. Taylerson*, 11 Ad. and El. 1017.) Lord Denman, C. J., in delivering the judgment of the Court in the last named case, said: “The first question arising upon this clause<sup>1</sup> is, whether it extends to make the possession of coparceners, joint-tenants, or tenants in common, separate possessions from the time the act came into operation, or whether it has relation back to all coparceners, joint-tenants, and tenants in common, who have ever been such, from the first time of their being coparceners, joint-tenants, and tenants in common. If it is confined to make their possession separate only from the time of the act coming into operation, then it would not affect the present case, because the lessor of the plaintiff would only have a separate possession for a few years before the ejectment, and his right to recover would be what it was at common law, and, as we have before said, upon the second section of the act. But we are of opinion that, from the language of the act, it has a relation back, at least as far as relates to the object of this act, and has the effect of making their possessions separate from the time when they first became coparceners, joint-tenants, or tenants in common.”

## CHAPTER XI.

### THE RIGHTS OF COTENANTS BETWEEN ONE ANOTHER.

- Right to Possession of Chattels, § 245.
- Right to Possession of Chattels by Bailee, § 246.
- Right to Possession of Title Deeds, § 247.
- Right to Possession of every part of Realty, § 248.
- Right to Possession is not a right to injure, § 249.
- Right to take Possession, § 250.
- Right to use Common Property, § 251.
- Right to sever Personal Property, § 252.
- Right of Lessee or Licensee, § 253.
- Right of Cotenants of Crops, § 254.
- Right of Owners of Party Wall, § 255.
- Right of Owners of Party Wall, duration of, § 256.

§ 245. The possession of a chattel owned in any of the various species of cotenancy, like the possession of any realty so held, is something to which each of the cotenants is equally entitled. The result of this equality of right, when acting upon realty, is, as we shall show,<sup>1</sup> that each cotenant may at all times enter upon and enjoy every part and parcel of the common lands; but he must so do this as not to interfere with the equal right of each of his cotenants to possess and enjoy the same property, and every part thereof. Many kinds of personal property are not susceptible of beneficial enjoyment in common, nor even of a joint and equal possession. Hence the common law never undertook to assure to cotenants of personalty the common possession or enjoyment thereof. “If two be possessed of chattels, personalls in common by divers titles, as of a horse, an oxe, or a cowe, &c., if

<sup>1</sup> See sec. 248.



the other take the whole to himselfe out of the possession of the other, the other hath no remedie but to take this from him who hath done him the wrong to occupie in common, &c., when he can see his time."<sup>1</sup> As two or more persons could not, at the same time, well use or have actual possession of the same horse, cow, or other entire and inseverable chattel, and as each of the part owners was equally entitled to be in the exclusive enjoyment and possession of such chattel, and no one of them could exhibit any claim paramount to that of his fellows, the law refused to exercise any authority over the chattel, and left it with him who happened to have it in his possession.<sup>2</sup> In a case determined by the Supreme Court of Illinois, where the parties were tenants in common of a machine, the Court seemed to be of the opinion that each cotenant would be compelled, upon a proper demand, to permit the other to have an equal use with him of the subject of the cotenancy.<sup>3</sup> This portion of the opinion was, however, not necessary to the determination of the case. There is a class of chattels which we may term *severable*, because they are so susceptible of division that either of the cotenants may lawfully take his proportion from the mass, and thereafter hold it in severalty. While the law does not, in general, interpose in behalf of one cotenant because the other has the exclusive possession of any or all of the common property, and refuses to surrender or share such possession, yet, as we shall see hereafter, an exception exists in the case of severable chattels, where one of the cotenants, by maintaining exclusive control, prevents the other from making that severance of his moiety to which he is by law entitled.<sup>4</sup>

§ 246. A bailee or pledgee of a cotenant, in possession of a chattel belonging to the cotenancy may retain such possession as long as he continues to be such bailee or pledgee.<sup>5</sup> If the bailment be made by all the cotenants, it cannot be

<sup>1</sup> Litt. sec. 323.

<sup>2</sup> Conover v. Earl, 26 Iowa, 169; Frans v. Young, 24 Iowa, 378; Koningsberg v. Launitz, 1 E. D. Smith, 215; Farr v. Smith, 9 Wend. 338; Southworth v. Smith, 27 Conn. 359; Jones v. Brown, 38 E. L. & E. 304; Russell v. Allen, 13 N. Y. 177; Hart v. Fitzgerald, 2 Mass. 509; Wright v. Bennett, 3 Barb. 451.

<sup>3</sup> Swartwout v. Evans, 37 Ill. 442.

<sup>4</sup> See sec. 252.

<sup>5</sup> Franz v. Young, 24 Iowa, 375.



terminated by any less number, and the bailee may successfully resist a suit for the possession until a demand has been made by *all* the co-owners.<sup>1</sup>

§ 247. **Title Deeds pass with the Land.**<sup>2</sup>—He in whom the title to land is exclusively vested, has a right to the sole custody of all the deeds which in their operation are limited to his land. An equal right to the custody of a deed, or other muniment of title, may exist: 1st, when two or more persons are cotenants of the property described in the deed; 2d, where two or more persons have different parcels of land in severalty, the title to which is deraigned through the same conveyance. In either case, the rights of the parties to the possession of the common muniment of title seem to be identical with the rights of cotenants to the possession of their common, inseverable chattels. Whoever has possession may retain it. If, however, it happens to be out of his custody, and another equally entitled take it, he may keep it. In other words, the right to the possession of the deed being equal, the law will not interfere to take it away from either.<sup>3</sup> Hence one lessee cannot sustain detinue against his co-lessee for the possession of their common lease.<sup>4</sup> Nor can such action be maintained by any person for a muniment of title, as against another equally entitled to its custody. “It is well established by the second resolution in Lord Buckhurst’s Case, 1 Co. Rep. 1, and by other authorities, that he who has occasion to use a deed is entitled to the legal custody of it; but, where two have an equal interest in a deed, and each may have occasion to use it, as, for instance, where the same deed grants Whiteacre to A and Blackacre to B, as it is manifest that both cannot hold the deed at the same time, to whom does the legal custody belong? If it were a chattel, it might be used in turn by several having an interest in it; but it is not so with a deed, which must remain in some custody until the occasion for using it may arise. Upon this subject there are few authorities, for the cases relating to property do not apply. In the

<sup>1</sup> Atwood v. Ernest, 13 Com. B. 889; 76 E. O. L. 889.

<sup>2</sup> Lord v. Wardle, 3 Bing. N. O. 680; 4 Scott, 402.

<sup>3</sup> Jickling on the Analogy between Legal and Equitable Estates, 240.

<sup>4</sup> Clowes v. Hawley, 12 Johns. 484.

case put, each has a common interest, and each may have occasion to use the deed, but both cannot use it at the same time. The only way of avoiding unseemly contest for the possession is to rule that he who first has it may keep it; and this seems to be the result of the only authority which bears directly on the subject. In *Vin. Abr. Fairs (Z)* pl. 15, it is laid down, from *Bro. Abr. Charters de Terre* and the *Year Book*, 4 H. 7, fo. 10, that 'if land be given to A for life, remainder over (to several) by deed, any of them who first gets the deed shall retain it; and, therefore, whoever has any land entered in the deed, where others have residue of the land, yet he that has this parcel may on account thereof retain the deed.'

"The reason which gives the first possessor a right to hold the deed so long as he retains it in his possession, gives the other party having an interest in the deed a right to keep it should it come to his custody. It is the interest which each has in the deed, and the occasion which each may have to use it, which gives each the title to have it. In the case put, it may hold the deed against B, because he has an interest in it and may have occasion to use it, and therefore if he get it from A, he may hold it against A. For fraud or force which may be used to get possession of the deed, either party may perhaps have a remedy against the other; but the title to the deed is ambulatory between those who have an interest in and may have occasion to use it, and each is entitled to keep the deed from the other so long only as he actually retains it in his custody and control, but no longer."<sup>1</sup> While a tenant in common cannot sustain any action at law against his cotenant for the possession of their title deeds, he may, by proceedings in equity, compel them to be produced for his inspection.<sup>2</sup> Courts of equity will also make such orders in regard to the custody and preservation of title deeds as may be necessary to secure the rights and promote the convenience of the cotenants.<sup>3</sup>

<sup>1</sup> *Foster v. Crabb*, 12 Com. B. 149; 16 Jur. 835; 21 L. J. C. P. 189; *Yea v. Field*, 2 T. R. 708.

<sup>2</sup> *Wright v. Plumtree*, 3 Mad. Ch. 481.

<sup>3</sup> *Elton v. Elton*, 6 Jur. N. S. 136; *Yates v. Plumbe*, 2 Smale & G. 174; *Burton v. Neville*, 2 Cox, 242; *Lambert v. Rogers*, 2 Mer. 489.

§ 248. **Right to be in Possession of Realty.**—Every member of a cotenancy, irrespective of the quantity of his interest, has the right at all times to be in possession of every part and parcel of the real estate of the cotenancy. This right neither of his cotenants can lawfully impair or abridge. Neither has any right to restrain the entry of the other, though such entry is sought to be made in order to accomplish some act prejudicial to the rights of the cotenant who resists it. Thus, where two were tenants in common of a barn-floor, on which one of them sought to enter for the avowed purpose of removing the other's wagon, and the latter resisted the entry, the Supreme Judicial Court of Massachusetts were of the opinion "that the defendant, as tenant in common of a barn-floor, occupied by complainant and himself, had no right to use force and violence to prevent his cotenant from entering the door, though it was for the declared purpose of removing defendant's wagon; and that such declared purpose afforded no justification for the assault."<sup>1</sup> In an important and well considered case, decided by the Supreme Court of California, the defendant resisted an action of ejectment brought by his cotenant, and justified his resistance on the ground that his possession, though exclusive as to a parcel, did not embrace any greater area than he would be entitled to upon a partition of the entire tract. The portion of the opinion of the Court disposing of this branch of the case is as follows:

"Had the defendant a right to the exclusive possession of the sixty acres, on the ground that it did not exceed his share?

"As the case does not show that there had been any partition between the parties, and as it does not disclose a lease from the plaintiff to the defendant, nor any agreement or license to occupy, it follows, that if the defendant had the exclusive right asserted, it must be found in the law of the relation that existed between the parties as tenants in common.

"A tenancy in common is where two or more hold possession of lands or tenements at the same time by several and distinct titles. The quantities of their estates may be

<sup>1</sup> Commonwealth v. Lakeman, 4 Cush. 597.

different; their proportionate shares of the premises may be unequal; the modes of acquiring their titles may be unlike, and the only unity between them be that of possession. Thus, one may hold in fee and another for life; one may acquire his title by purchase, another by descent; one may hold a fifth, another a twentieth, and the like.<sup>1</sup> Tenancies in common differ in nothing from sole estates but the blending and unity of possession.<sup>2</sup> 'Neither of the cotenants knoweth his own severalty, and therefore they all occupy promiscuously. Tenants in common are they which have lands and tenements in fee-simple, fee-taile, or for term of life, etc.; and they have such lands or tenements by several titles, and not by a joint title; and none of them knoweth his severall, but they ought by the law to occupie these lands or tenements in common, and *pro indiviso*, to take the profits in common. And because they come to such lands or tenements by severall titles, and not by one joint title, and their occupation and possession shall be by law between them in common, they are called tenants in common.'<sup>3</sup> Coke, in commenting on the foregoing passage, remarks as follows: 'The essential difference between joint-tenants and tenants in common is, that joint-tenants have the land by one joint title and in one right, and tenants in common by severall titles, or by one title and severall rights; which is the reason that joint-tenants have one joint freehold, and tenants in common severall freeholds. Onely, this property is common to them both, viz., that their occupation is undivided, and neither of them knoweth his part in severall.'<sup>4</sup> In section three hundred and twenty-three, it is stated that 'each of the tenants in common may enter and occupy in common, *per my et per tout*, the lands and tenements which they hold in common; and this notwithstanding they are severally seized.'

"From these citations it is manifest that by the very law of the relation existing between tenants in common, each and every of them has the right to enter upon and occupy the whole of the common lands and every part thereof. The rule that tenants in common hold their lands by unity of

<sup>1</sup> 2 Bl. Com. 191; Co. Litt. 189 a.

<sup>2</sup> 2 Bl. Com. 194.

<sup>3</sup> Litt. 188 b.

<sup>4</sup> Coke Litt. sec. 292.

possession inculcates something more than the technical truth that the possession of one tenant is *prima facie* the possession of the other. In our judgment, it also involves the doctrine that the tenants, respectively, have a right to enter upon the whole, and upon every part of the whole land, and to occupy and enjoy the whole and every part of it, and that the tenants, respectively, are restrained, by correlative obligation, from resisting the exercise of this right in either of its branches. \* \* \* Before partition, a tenant in common has no share, except one which is undivided; and that he cannot possess in severalty, for the reason that it is undivided; and, furthermore, he 'knoweth not of this, his severall.' The only unity between tenants in common is the unity of possession, and if each man knew and could designate his part in severalty, without partition, even this unity would soon be destroyed. He who has no right to possess, except in common with others, in claiming the right to possess solely any part of that to which the common right extends, utters a solecism.

"Counsel insist that 'while defendant occupies no more than his proportionate share, such possession is consistent with the common title, and therefore his possession is no ouster.' It is true that the bare occupation of the sixty acres by the defendant is not inconsistent with the common title; but couple with that occupation a refusal on his part to allow the plaintiff to enter and occupy the sixty acres with him, and we have then a possession in him that is not consistent with the common title, and which, therefore, does amount to an ouster."<sup>1</sup>

<sup>1</sup> *Carpentier v. Webster*, 27 Cal. 544. This decision was made the subject of a lengthy and unfriendly review in the numbers of *The Pacific Law Magazine* published respectively in January and February, 1867, (vol. 1 p. 1, and vol. 1 p. 67.) The reviewer, no doubt, considered the doctrine that different cotenants may at the same time be "in the *actual possession*—the positive *pedis possessio*—not only of the same identical piece of land, but of every part, parcel, and particle thereof—all claiming under separate derivations of title—all having diverse views and interests as to the use to be made of the premises—and each being equally entitled with every other to occupy the same spot, at the same time," as involving a legal, moral, and physical heresy. As a legal heresy, because inconsistent with the authorities; as a moral heresy, because it permits a cotenant to enter upon and enjoy the lands improved and beautified by another; as a physical heresy, because it authorizes two or more persons at the same time to occupy the same space. In the forty odd pages devoted to this review, no single opinion, whether of a Judge or of a text-writer, has

§ 249. **No Right to Injurious Occupancy.**—The right of each cotenant at all times to enter upon the common property must be exercised in a manner which permits the enjoyment of the equal right of every other cotenant. It is not a right to occupy in a manner injurious to the others. Therefore, neither has the right to erect a dam on lands of which he is sole owner or otherwise, and thereby flood the common property. Such flooding would be a practical exclusion of the others; and is in fact an ouster.<sup>1</sup>

§ 250. **The right to take possession of the subject of the cotenancy,** whether it be of real or personal estate, seems to be conceded to every cotenant. Thus, in the case of chattels, the only remedy when one cotenant has sole possession, according to Littleton, is for the other to take it "when he can see his time."<sup>2</sup> For an exclusive possession of realty, the law has furnished a more orderly and more adequate remedy. But even in case of realty, a tenant in common has the same right to enter into possession as though he were tenant in severalty. He may go upon the land in any manner not involving a breach of the peace. If he acquire possession by

been brought forward, necessarily nor even impliedly inconsistent with the doctrine which the reviewer seeks to impugn. Instead of producing authorities in conformity with his view, he reproduces the same quotations from Coke, Littleton, and Blackstone, quoted and relied upon by the Supreme Court of California, and gives his interpretation of the language of these writers as follows: "They are not to be understood as intending to convey the meaning that all the tenants in common of a tract of land either may or can actually and bodily occupy, and use, and take the profits of the same identical part of the common lands, which would be impossible and contrary to the order of nature, but they must, to be consistent with their own maxims, mean simply that the occupation of the whole or of any definite portion of the common lands by one is equally the occupation of the other; that the unity of possession in such case exists between the in-tenant and the out-tenant; and that so long as this legal unity of possession continues, the out-tenant cannot maintain ejectment against the in-tenant; but that, if this legal unity of possession be broken by any act of one of the tenants, as for instance by driving off the cattle of the cotenant from vacant lands, or by preventing the cotenant to enter and occupy any portion of the common lands, or, according to the later authorities, by denying the title or right of the cotenant, then and in such case the legal unity of possession is broken, and an action of ejectment may be maintained." (Pacific Law Magazine, vol. 1, p. 77.) The doctrine of *Carpentier v. Webster* was reaffirmed in *Tevis v. Hicks*, 38 Cal. 240.

<sup>1</sup> *Great Falls Co. v. Worster*, 15 N. H. 459; *Odiorne v. Lyford*, 9 N. H. 502; *Thomas v. Pickering*, 13 Me. 353; *Hutchinson v. Chase*, 39 Me. 514.

<sup>2</sup> Litt. sec. 323. One joint owner of property cannot be guilty of larceny by taking and disposing of the whole, unless he took it out of the hands of a bailee. *Kirksey v. Fike*, 29 Ala. 208.

stealth, but without any disorderly, tumultuous, or forcible proceedings, his entry is justifiable, and no one has any right to remove him.<sup>1</sup> No doubt, the same rule is applicable to the retaking of a chattel from the cotenant who happens to have it in his possession. But a cotenant has no right to take or to retain possession under circumstances which would not justify such taking or detention if he were sole owner. Hence, if he take a lease of his cotenant who is in sole possession, and thereby is enabled to enter upon the premises, he must surrender the possession at the termination of his lease. If he refuse, he may be removed by an action for an unlawful detainer.<sup>2</sup>

§ 251. **Right to use Common Estate.**—Some of the authorities declare, in general terms, that joint-tenants, tenants in common, and coparceners “have a right to enjoy the estate as they please.”<sup>3</sup> But the enjoyment sustained by these authorities is not a capricious, irresponsible employment of the subject of the cotenancy; nor does it include such use of the common estate as can only arise in obedience to the promptings of passion, of malice, or of insanity. It is a reasonable enjoyment in some of the ordinary methods of reaping profits from property of like character and under like circumstances.<sup>4</sup> An inquiry into the use or employment which one cotenant may make of the common property involves the consideration: 1st, of the acts which he may lawfully do to and with the subject of the tenancy; 2d, what uses of the common property, not prohibited by law, are so far in excess of the rights of the cotenant making the use, as to impose upon him an obligation recognized and enforced, either at law or in equity, to reimburse the other cotenants on account of this excess. The second branch of this inquiry we shall postpone for the present, to be resumed in the chapter upon the liabilities of cotenants among one another. The acts which either cotenant may lawfully do to and with the common property seem to embrace everything not amounting to an ouster of the other

<sup>1</sup> Wood v. Phillips, 43 N. Y. 155.

<sup>2</sup> Hershey v. Clark, 27 Ark. 528.

<sup>3</sup> Story's Eq. Jur. sec. 916; Hole v. Thomas, 7 Ves. 589.

<sup>4</sup> Hawley v. Clower, 2 Johns. Ch. 122.



cotenant, or to a *destruction*, in whole or in part, of the subject of the tenancy. A destruction in the case of chattels may be either an annihilation of the chattel, or such a use or disposition of it as results in a practical annihilation of the rights of the other cotenants therein.<sup>1</sup> A destruction where the cotenancy is of real estate is some act or series of acts, by which the estate is injured beyond what would result from any of the ordinary and reasonable means of obtaining profit from a like estate. Thus, if timber standing on the land is of proper size and condition for advantageous sale, either of the cotenants may lawfully proceed to cut and sell it; for in so doing, he makes no unusual use of the real estate of which he is a tenant in fee.<sup>2</sup> But if, on the other hand, he cut saplings and underwood at unseasonable times, this necessarily involves a sacrifice of the interest of the other owners, and is therefore a destruction.<sup>3</sup> So, if a crop be planted and growing upon the common lands, and one of the part owners enter and plow it up or otherwise *destroy* it, this would be as much a destruction as is the cutting of young, unmarketable timber.<sup>4</sup> A direct removal of the earth itself is a destruction *pro tanto*. Hence no part owner has any right to dig up the soil and convert it into bricks for the purpose of sale,<sup>5</sup> nor to take out turf for a like purpose.<sup>6</sup> If the cotenancy includes a water power, or other water right, neither one, nor even a majority of the cotenants, will be permitted to divert the water to his sole use,<sup>7</sup> nor to so employ it as may result in the destruction of their common reservoir.<sup>8</sup>

§ 252. The right of either cotenant to sever personal property, severable in its nature, and existing in common bulk and being of the same quality throughout, was probably recognized at common law, though we have found no authorities there bearing upon this question. In the United States, this

<sup>1</sup> See secs. 312-319, for what acts constitute a *destruction* of a chattel.

<sup>2</sup> *Martyn v. Knowllys*, 8 T. R. 145; *Hihn v. Peck*, 18 Cal. 640; *Dodd v. Watson*, 4 Jones Eq. 48; *Baker v. Wheeler*, 8 Wend. 507; *Alford v. Braden*, 1 Nev. 280.

<sup>3</sup> *Hole v. Thomas*, 7 Ves. 589.

<sup>4</sup> *Harman v. Gartman*, Harper, 430.

<sup>5</sup> *Dougall v. Foster*, 4 Grant's Ch. 325.

<sup>6</sup> *Wilkinson v. Haygarth*, 12 Q. B. 887; *Coppinger v. Gubbins*, 3 Jones & L. 397.

<sup>7</sup> *Bliss v. Rice*, 17 Pick. 23; *Kennedy v. Scovil*, 12 Conn. 327.

<sup>8</sup> *Ballou v. Wood*, 8 Cush. 48.



right has been involved in legal controversy with considerable frequency, and has uniformly been sustained as to all property of which the share of each cotenant can be ascertained by weight or measurement without the assistance or consent of the others. If a tenant in common of such property takes any portion thereof not beyond his share, this is regarded as a lawful severance, and not as an improper assumption of authority. So long as he does not exceed his just proportion, he may carry away, sell, or destroy it without incurring any liability to his cotenants.<sup>1</sup> "The rule should, of course, be confined to property readily divisible and commonly divided by weight, tale, or measurement, into portions absolutely alike in quality and value, as grain in bulk, money, and the like. It could not reasonably be applied in principle, or in practice, to things in their nature so far undivisible that the share of one cannot be distinguished from that of another, and where each article or item has a distinct identity, plainly distinguishable from the others, and of a different value."<sup>2</sup> The cases calling for the application of this rule have been chiefly, and so far as our observation extends, exclusively, adjudications in reference to grain of the same kind and quality. We have therefore no means of specifying what other articles are of so severable a nature as to come within the rule. Whenever a cotenant is authorized to make a severance of personal property, his creditors, acting under an execution or attachment against him, may lawfully seize and sever his share, or so much thereof as is not by law exempt from such seizure.<sup>3</sup>

§ 253. By either lease or license, a joint-tenant, coparcener, or tenant in common, may confer upon another person the right to occupy and use the property of the cotenancy as fully as such lessor or licensor himself might have used or occupied it if such lease or license had not been granted. If either cotenant expel such licensee or lessee, he

<sup>1</sup> *Tripp v. Riley*, 15 Barb. 333; *Fobes v. Shattuck*, 22 Barb. 568; *Kimberly v. Patchin*, 19 N. Y. 330; *Clark v. Griffith*, 24 N. Y. 595; *Lobdell v. Stowell*, 87 How. Pr. 91; *Fiquet v. Allison*, 12 Mich. 328; *Erwin v. Clark*, 13 Mich. 19; *Newton v. Howe*, 29 Wis. 535.

<sup>2</sup> *Channon v. Lusk*, 2 Lans. 213.

<sup>3</sup> *Newton v. Howe*, 29 Wis. 536.

is guilty of trespass.<sup>1</sup> If the lessee has the exclusive possession of the premises, he is not liable to any one but his lessor for rent, unless the other cotenants attempt to enter and he resists or forbids their entry, or unless, being in possession with them, he ousts or excludes some or all of them;<sup>2</sup> or unless, under the law of the State, the lessor himself would have been liable had he been in such exclusive possession. Whenever either of the cotenants may lawfully cut or remove trees, he may authorize another to do so.<sup>3</sup> Where two persons were joint owners of a lake, with a common right of floating, fishing, sailing, etc., it was contended that one of them could not alienate "a portion so as to give the right to use the loch for fishing, boating, and so on; for that by such a course he would be making the interest of the other less than it in fact is; that he would be making him an owner to the extent of one-third of the lake, instead of one-half; that the ownership of the lake was what is called a '*jus individuum*'—incapable of division; and that where there are two joint proprietors of such a right, one of them cannot, without the consent of the other, introduce a third." In disposing of this objection, Lord Chancellor Cranworth said: "The argument of the appellant rests upon the assumption that the right to a loch is a right incapable of division. But upon what does this rest? The proposition comes strangely in a case which is founded on the joint ownership of the two. There is nothing in the law of Scotland, so far as I have been able to discover, to prevent the owner of a loch from alienating any portion of it as he may think fit. So also when the right to a loch is held as a mere pertinent to the land. If, indeed, the effect of an alienation by one of two co-owners should be to deprive the other owner of the full right as to his moiety, then that would give a right of action for regulation of the enjoyment. But a similar right would exist independently of the alienation, if one of two co-owners should use his right in excess, so as to interfere with the right of the other. To illustrate this, suppose it were not possible for more than any given number of boats (say a thousand) to be simultaneously engaged in fish-

<sup>1</sup> McGavrell v. Murphy, 1 Hilt. 132.

<sup>2</sup> Badger v. Holmes, 6 Gray, 118.

<sup>3</sup> Baker v. Wheeler, 8 Wend. 507; Alford v. Bradeen, 1 Nev. 230.

ing on the lake, the appellant would be entitled to have five hundred so employed, and Strowan would be entitled to the other five hundred. Strowan could not, by alienating to others, give a right to more than his due share; but if he keeps within that limit, appellant has no right to complain. It is the same thing to him whether the right is exercised by Strowan or by others deriving title under him. In either case, Strowan or his disponees might be restrained from any excessive exercise of the right enjoyed in common with another; but Strowan could not be prevented from exercising, subject to the liability to be thus regulated, the right incident to property in general of alienating it as he may think fit.

Reliance was placed upon two cases in which it was held that where there are two joint owners of a moor, one of them cannot, without the consent of the other, let to a third person the right of sporting over it. Those cases, however, proceeded upon the special nature of the right attempted to be raised. It certainly was not meant to be decided that one of two joint owners of a moor may not sell his interest, or any share of it, to as many joint purchasers as he may choose. The same principle must govern the ownership of two or more owners in common of a loch, which is the case here; and I therefore concur with a majority of the Judges below in the conclusion that it was competent for Strowan to sell and convey to the respondent the right to use the loch, as 'pertinent to the lands of Kinloch.'<sup>1</sup>

§ 254. One who agrees to raise and crop upon the lands of another, and to divide the same with the land owner, instead of paying rent, becomes, as we have seen, a tenant in common with the owner of the crops produced under the agreement.<sup>2</sup> This cotenancy deals with, and is inseparably connected with the possession of the land. For the purpose of doing all acts necessary to be done, in producing, cultivating, harvesting, or removing and dividing such crops, each of the parties has an equal right to enter upon the lands; and if either forcibly resists the entry of the other, or removes him after such entry, he is guilty of assault and battery.<sup>3</sup> But if

<sup>1</sup> *Menzies v. Macdonald*, 86 E. L. & E. 24.

<sup>2</sup> See sec. 100.

<sup>3</sup> *Commonwealth v. Rigney*, 4 Allen, 817.

the one has no right to forcibly resist the other who is about to exercise his right of entry, it seems equally clear that the other, if resisted, has no right to enter forcibly; and that if, in entering, he uses violence towards his cotenant, he becomes a trespasser from the first, and an action of trespass is maintainable against him "for all damage resulting from the loss to the real estate, and from the removal of the common property."<sup>1</sup>

§ 255. The respective owners of a party wall have the ownership thereof in severalty, each owning up to the division line between his lot and that on which the adjoining building stands. Each has an easement in the other's half of the wall, which entitles each to the use of the whole wall to support his building adjacent thereto. Either may increase the height of the wall for the purpose of adding buildings on his side;<sup>2</sup> and if, when so increased, the other tears the wall down to its former height, he is liable as a trespasser.<sup>3</sup> Neither party has any right to pull down the wall, nor to remove it in whole nor in part, except when its ruinous condition renders such action necessary.<sup>4</sup> In a case determined in Massachusetts, one of the proprietors of an ancient party wall was paring about four inches of it off on the side next to his lot, and erecting another wall about two inches from the portion of the former wall which remained after the paring. The new wall was connected with the other by occasional projecting bricks and ties. A bill in equity was filed disclosing these facts, and praying for an injunction to restrain this paring of the old wall. In stating its reason for granting the relief prayed for, the Court said: "The right which the plaintiff had was an easement of support in a solid party wall. The acts of the defendant tended to destroy this right. If he could cut off the old wall in part, and erect a new one separate from it at a distance of two inches, and connected with it only by occasional supports or ties, he might, in like

<sup>1</sup> *Daniels v. Brown*, 34 N. H. 459.

<sup>2</sup> *Brooks v. Curtis*, 50 N. Y. 644.

<sup>3</sup> *Matts v. Hawkins*, 5 Taunt. 20.

<sup>4</sup> *Sherred v. Cisco*, 4 Sanf. 487; *Richards v. Rose*, 9 Exc. 218; 24 E. L. & E. 406; 17 Jur. 1036; 23 L. J. R. (N. S.) Ex. 3.

manner, erect his new wall at a distance of two feet or two yards, and connect it with the residue of the old wall by ties of stone or wood. After such an alteration as that made by the defendants, the plaintiff's estate might be as strong and well supported as before, but it would cease to be upheld or sustained by the ancient party wall—a solid structure, such as the plaintiffs had from time immemorial enjoyed. Under the most liberal rule of allowing an adjoining owner to alter and repair a partition wall to suit his own convenience, and to adapt it to his wants in erecting a new building or repairing an old one, no case goes so far as to authorize acts to be done by him which in effect destroy the character of the structure as a party wall.”<sup>1</sup> The rights of the adjacent owners to their party wall continue as long as the wall is sufficient for the purpose for which it was designed, and the respective buildings continue in a condition to need its support. But if the wall becomes so decayed and ruinous that a due regard for life or property renders its removal necessary, either owner may, after due notice to the other, proceed to remove it, and to rebuild another in its place; and if in so doing he proceed with reasonable skill, care, and speed, he is not responsible for any damage occasioned to the other by loss of business or by exposure of his property to the weather.<sup>2</sup>

§ 256. The duration of the rights and obligations of owners of party walls, though a question of great importance, is involved in grave doubts. When a party wall has been established, it may, by the repair of dilapidations or by repeated tearing down and rebuilding, be continued perpetually. Has either party the right to call on the other to repair and rebuild, and thus to keep up the wall forever; or may either, on the total or practical destruction of the wall, refuse to join in the erection of another, and release his land from the easement which had been attached to it? Chancellor Kent, following the law of France, and out of respect to what he deemed the equity of the case, declared that when a wall became ruinous, both parties were bound to contribute to its repair and reconstruction; and he accordingly compelled one to reim-

<sup>1</sup> Phillips v. Boardman, 4 Allen, 149.

<sup>2</sup> Partridge v. Gilbert, 15 N. Y. 601.

burse the other for expenses incurred in rebuilding their partition wall.<sup>1</sup> But this decision has been doubted, and in all probability will, whenever it is directly drawn in question, be overruled in the State where it was pronounced. In one instance, it has already been determined that the destruction of the building also destroys all obligations between the parties connected with their party wall; and, therefore, that if one of them rebuild, placing the wall where it was before, the title to so much of the wall as is beyond the division line of the lots is thereby vested in the owner of the adjacent lot, and that such adjacent owner may therefore use this wall as his own, without contributing anything towards paying for its erection.<sup>2</sup> It will be seen that this case differs from that of *Campbell v. Mesier*, in the fact that the wall was destroyed, instead of being merely in a ruinous condition. That this difference is not likely to be regarded as material, appears by the following extract from the opinion of Denio, C. J., of the Court of Appeals: "I do not perceive any solid distinction between a total destruction of the wall and buildings, and a state of things which would require the whole to be built from the foundation. In either case, there is great force in saying that the mutual easements have become inapplicable, and that each proprietor may build as he pleases upon his own land, without any obligation to accommodate the other. Circumstances may have materially changed since the adjoining proprietors were content with such walls as would have supported two adjoining dwellings. If the right of mutual support continues, by means of the original arrangement, or by prescription, it is for just such an easement as was originally conceded, or which has been established by long enjoyment. But in the changing condition of our cities and villages, it must often happen, as it did actually happen in this case, that edifices of different dimensions, and entirely different character, would be required. And it might happen, too, that the views of one

<sup>1</sup> *Campbell v. Mesier*, 4 Johns. Ch. 334.

<sup>2</sup> *Sherred v. Cisco*, 4 Sanf. S. C. 480. A party who builds a wall one-half on his own and one-half on his neighbor's land, cannot enforce contribution from the latter when he uses the wall in connection with a building. To entitle the builder to contribution, in such case, he must have put the wall on the other's land lawfully, and with an agreement that it should be paid for when used. *List v. Hornbrook*, 2 West. Va. 340.

of the proprietors, as to the value and extent of the new buildings, would essentially differ from those of the other; and the division wall, which would suit one of them, would be inapplicable to the objects of the other."<sup>1</sup>

In view of the preceding decisions, we think it may be safely assumed that the mere fact that adjoining proprietors have or had a party wall does not impose upon them, nor their successors in interest, any obligation to rebuild the wall when destroyed, nor to do work upon it which, in substance, amounts to a rebuilding, in a case where the wall has become in a ruinous state of dilapidation. The suggestion of Judge Denio, that in cities coterminous owners frequently find it necessary to change the uses formerly made of their property, and that therefore a party wall necessary and sufficient at one time, may, at a subsequent period, become unnecessary or inadequate, deserves great consideration; and we doubt whether one of the owners of a party wall can, under any circumstances, in the absence of some special agreement, be compelled to maintain or rebuild it when it is no longer suitable to the changed condition of his business or of his property.

<sup>1</sup> Partridge v. Gilbert, 15 N. Y. 615.

## CHAPTER XII.

### LIABILITIES OF COTENANTS TO ONE ANOTHER.

Classification of, § 257.

For Use and Occupation, § 258.

For Rents and Profits, § 259.

For Services of Cotenant, § 260.

For Repairs, § 261.

For Improvements, § 262.

For removal of Lien, Claim, or Title, § 263.

For Money collected on Insurance, § 264.

For Injuries arising from Repairing or Preserving, § 265.

For Negligence, § 266.

Of Owners of Party Wall, § 267.

§ 257. **Classification.**—The liabilities of cotenants to each other, arising out of their connection with the common property, will now be considered. In such consideration, we shall exclude, as foreign to our purpose, all inquiry in reference to leases or other contracts made between the cotenants, because their effect is to be determined by reference to their express stipulations, and by the application of the same rules of construction which would be properly called into requisition if the contract were between persons not liable to any of the consequences flowing from a joint or common interest in the same property. All the claims which one cotenant may present against another, not founded upon any special agreement, and arising out of the subject of the tenancy, are: 1st, for use or occupation of the common property; 2d, for *profits received* from the common property; 3d, for services performed or moneys expended for its benefit; 4th, for damages occasioned to it by the wilful act or culpable negligence of the cotenant from whom redress is sought.



§ 258. **For Use and Occupation.**—In some parts of the United States, a cotenant occupying the entire real estate, or any portion more than equivalent to his interest, though without any denial of his co-owner's right to enter and enjoy in common with him, is liable to account for the value of such occupation.<sup>1</sup> But the decided preponderance of the authorities, both in England and in America, affirms the right of each cotenant to enter upon and hold exclusive possession of the common property, and to make such profit as he can by proper cultivation or by other usual means of acquiring benefit therefrom, and to retain the whole of such benefits,<sup>2</sup> provided that in having such possession, and in making such profits, he has not been guilty of an ouster of his cotenant, nor hindered the latter from entering upon the premises and enjoying them as he had a right to do.<sup>3</sup> The reasoning upon which these decisions constituting the great bulk of the authorities on this subject rests is: That as each cotenant has, at all times, the right to enter upon and enjoy every part of the common estate, this right cannot be impaired by the fact that another of the cotenants absents himself or does not choose to claim his right to an equal and common enjoyment; that it would be inequitable to compel a cotenant in possession to account for the profits realized out of his skill, labor, and business enterprise, when he has no right to call upon his cotenant to contribute anything towards the production of these profits, nor to bear his proportion when, through bad years, failure of crops, or other unavoidable misfortune, the use made of the estate resulted in a loss instead of a profit to the one in possession.

§ 259. **The liability of each cotenant to account for rents and profits received,** was created by the statute 4 and 5 Anne, ch. 16, and is now universally recognized. Considerable differences of opinion are manifest from the reports, both English and American, as to what a cotenant must ac-

<sup>1</sup> *Thompson v. Bostwell*, 1 McMullen Eq. 75; *Shiels v. Stark*, 14 Geo. 437.

<sup>2</sup> *Peck v. Carpenter*, 7 Gray, 283; *Crane v. Waggoner*, 27 Ind. 52; *Shephard v. Richards*, 2 Gray, 424; *Woolaver v. Knapp*, 18 Barb. 265; *Israel v. Israel*, 30 Md. 120; *Pico v. Columbet*, 12 Cal. 414; *Becnel v. Becnel*, 23 La. An. 150.

<sup>3</sup> *Sears v. Sellev*, 28 Iowa, 505; *Carr v. Passaic L. & I. B. Co.* 22 N. J. Eq. 85; *Israel v. Israel*, 30 Md. 126.

count for; and in America further judicial discussion has arisen, some of the authorities holding that this statute, by imposing an obligation to account, authorizes the Courts to sustain an action of *indebitatus assumpsit* for not accounting, while the other authorities declare that the only remedy is in an action of account at law, or by a bill in equity for like purpose. The decisions upon both these questions will be shown in a subsequent chapter, upon the remedies of cotenants against one another.<sup>1</sup>

§ 260. **Compensation for his services in managing or taking care of the property** is never awarded to a cotenant, except as the result of a direct agreement to that effect; or unless, from all the circumstances of the case, the Court is satisfied of the existence of a mutual understanding between the parties that the services rendered by one should be paid for by the others.<sup>2</sup> In this respect, the law of cotenancy is like that of partnership. A partner in taking care of and managing the property of the concern is performing no more than his duty, and is therefore entitled to no compensation from his copartners. But if, at the request of the others, he perform services which neither the law nor his partnership obligations impose on him, "an agreement is implied that he shall be paid."<sup>3</sup> We have no doubt a like agreement will also be implied when one cotenant has, at the request of the others, performed services which the relation of cotenancy did not impose upon him.

§ 261. **Compensation for repairs or improvements made to or upon the subject matter of a cotenancy** may be claimed: 1st, as forming a sufficient affirmative cause of action against one of the co-owners not contributing his proportion of the expenses thereof; 2d, as forming a matter of set off, to be deducted from an amount which one making the repairs is under obligation to pay to another of the cotenants for mesne profits,

<sup>1</sup> See Chap. XIII.

<sup>2</sup> *Sears v. Munson*, 23 Iowa, 389; *Bradford v. Kimberly*, 3 Johns. Ch. 433; *Franklin v. Robinson*, 1 Johns. Ch. 164; *Raun v. Reynolds*, 18 Cal. 289.

<sup>3</sup> *Levi v. Karrick*, 13 Iowa, 350; *Lewis v. Moffatt*, 11 Ill. 392; *Caldwell v. Lieber*, 7 Paige Ch. 483.

or for profits made or *received* from the thing owned in common. There are general expressions, especially in the American reports, indicating that one cotenant may recover in an action against another for necessary repairs which the latter, after demand, refused to join in making.<sup>1</sup> All the cases agree that a notice of the repairs needed, and a demand that he participate in making them, is a prerequisite to a recovery in such an action against a part owner.<sup>2</sup> But we doubt whether any case can be cited in which, proceeding upon and by virtue of the common law, and in the absence of an agreement to join in repairs, a cotenant obtained judgment against one of his fellow-tenants for repairs made without the assent of the latter, either expressed in direct terms, or necessarily implied from the situation of the parties or their course of dealing between each other. The common law remedy, available to a cotenant who wished the others to assist in necessary repairs, was by writ *de reparatione faciendâ*.<sup>3</sup> But this writ was allowed only when a mill or house fell into *décay*.<sup>4</sup> It was not employed to obtain contribution for repairs *previously made*; but to compel a cotenant *to make*, under the order and direction of the Court, such repairs as it adjudged to be proper.<sup>5</sup> Except this remedy, to which recourse must have been had before any repairs were made, "at common law, no action lies by one tenant in common, who has expended more than his share in repairing the common property against the deficient tenants."<sup>6</sup> A case illustrating the rule that the assent of a part owner to necessary repairs may be presumed under peculiar circumstances and from a prior course of dealing between the parties, was determined in the Supreme Court of the State of Illinois. An act of the Legislature granted to several persons and their heirs and assigns, a franchise to

<sup>1</sup> Dech's Appeal, 57 Pa. St. 472; Denman v. Prince, 40 Barb. 217.

<sup>2</sup> Mumford v. Brown, 6 Cow. 476; Kidder v. Bixford, 16 Vt. 172; Stevens v. Thompson, 17 N. H. 111.

<sup>3</sup> Co. Litt. 200 b.

<sup>4</sup> Bowles' Case, 11 Co. 82 b; Co. Litt. 200 b; Carver v. Miller, 4 Mass. 561; Loring v. Bacon, 4 Mass. 576.

<sup>5</sup> Calvert v. Aldrich, 99 Mass. 76.

<sup>6</sup> Converse v. Ferre, 11 Mass. 326; Calvert v. Aldrich, 99 Mass. 76; Wiggan v. Wiggan, 43 N. H. 568.

establish and operate a ferry. They were required to build approaches to the ferry, and to keep and maintain the whole in condition for public use. One of the part owners resided in Europe. During his lifetime, he permitted the others to manage the ferry and the property connected with it. After his death, his heirs also resided in Europe, and never claimed or exercised any control over the property. An action in assumpsit was brought by the resident part owners against the heirs of the absent part owner, to recover for expenses and repairs in running the ferry boats, repairing and replacing them, and building and repairing the roads and dykes. Breese, J., in delivering the opinion of the Court, said: "The declaration shows that the greater part of the expenditure, for which contribution is claimed, was incurred in relieving their ferry boat from a serious disaster—repairing it, running it, and replacing it; and that the entire account is for repairs to the roads, bridges, and dykes. Now, all these things had to be done, under penalties, and in doing them, the plaintiffs, being on the spot, were enabled to discharge their associated liability to the public. There was a public duty resting on them, to be discharged by them. It could not, surely, have been understood by any one of the original associates, or by those purchasing an interest in the franchises, that on the death of any one of them, the enterprise was to terminate or be arrested in its progress to completion, and thereby all the money they had expended, and the franchises also, be lost, or put in such peril as to render them nearly valueless; or that one portion of the associates, no matter from what motive, could, by his own act, thwart the designs and operations of his fellows, bent on performing their obligations to the public, and on making the enterprise one of profit. It seems to us, that after the death of Paul Mehlgarten, and before partition, the same responsibility rested on his heirs as upon him, and that casualty did not destroy the association, nor should it cripple the exertions of those *on the spot*, who had, from the commencement, the management of the enterprise. Whatever sums of money they expended in good faith upon the leading objects of the association, and which were necessary in order to its enjoyment, and to the discharge of their obligations to the public, the

heirs of Paul Mehlgarten, the defendants in this suit, are justly chargeable with their proportion."<sup>1</sup>

§ 262. **Improvements.**—Neither cotenant has any power to compel the others to unite with him in erecting buildings or in making any other improvements upon the common property.<sup>2</sup> If either chooses to make such improvements, he cannot recover from the others for their share of the expenses incurred thereby, in the absence of an express agreement on their part, or of such circumstances, or such a course of dealing between the parties, as convinces the Court that a mutual understanding existed between them to the effect that these expenses were to be repaid.<sup>3</sup>

§ 263. **For removal of Liens and Clouds on Title.**—The purchase of an outstanding title, the removal of a tax or other lien or incumbrance, and the payment of a sum of money for the preservation of the common property, or for the protection or assertion of some common right, or the redress of some common injury, are all spoken of, in general terms, as affording a ground for contribution in favor of one cotenant and against another.<sup>4</sup> In no instance, however, have we found that either of these matters has been successfully employed as an affirmative cause of action on which to base a personal judgment against a non-contributing cotenant, in the absence of a previous authorization or a subsequent ratification of the transaction out of which the claim for reimbursement arose. If an outstanding paramount title be purchased by one cotenant, and the others fail or refuse to pay their share of the purchase price, the purchaser may indemnify himself by asserting the paramount title which he has so acquired. If instead of purchasing some title, he has discharged a valid lien against the property, he may assert this lien to the extent of compelling an equitable contribution.<sup>5</sup> And when he

<sup>1</sup> Haven v. Mehlgarten, 19 Ill. 95.

<sup>2</sup> Becnel v. Becnel, 23 La. An. 502.

<sup>3</sup> Thurston v. Dickinson, 2 Rich. Eq. 317; Thompson v. Bostick, 1 McM. Eq. 75; Dillett v. Whitner, Cheves Eq. 213; Taylor v. Baldwin, 10 Barb. 590; Drennen v. Walker, 21 Ark. 557.

<sup>4</sup> Story's Eq. secs. 505 and 1235; Williams v. Gray, 8 Greenl. 207.

<sup>5</sup> Tittsworth v. Stout, 49 Ill. 78.

has expended money in asserting some common right or redressing some common injury, or in preserving the common property, and has thereby been of advantage to his co-owners, he may have the amounts so expended credited to him, when called upon to account with his cotenants.<sup>1</sup> But we think all claims by one cotenant against another, arising out of the common property, and disconnected alike from any agreement between the parties, and from any circumstances which clearly establish that one must necessarily have been authorized to act for the other, must, in their assertion, be limited to the declaration and enforcement of a lien against the property. If a different rule prevailed, every part owner would constantly incur the hazard of being required to pay, for the removal of incumbrances, sums in excess of the value of the estate.

§ 264. **For Insurance Collected.**—A cotenant is liable to his companions for their proportion of a sum of money collected by him on a policy of insurance upon the whole property, which was effected in the name of one cotenant, with authority from others, and which policy purported to be “for whom it may concern.”<sup>2</sup> Two out of three tenants in common executed a lease of the whole estate. The lessee covenanted to insure for the benefit of the lessors. The third cotenant subsequently ratified the act of the others. The premises were burnt down during the occupancy of the lessee. The amount of the policy of insurance was paid to one of the lessors. The cotenant who did not join in the lease brought an action to recover a part of this amount, corresponding to his interest in the property destroyed. The Court held that the insurance, under the circumstances, was in the nature of rent, being one of the benefits secured by the demise; and that he who had recovered the whole of it, held it to the uses of his cotenants “respectively, in proportion to their aliquot parts of the common estate, and an action at law will lie for it.”<sup>3</sup>

§ 265. **Liability for Injuries.**—A tenant in common is not liable for injuries resulting from accidental consequences

<sup>1</sup> Gage v. Mulholland, 16 Grant Ch. 146.

<sup>2</sup> Briggs v. Call, 5 Met. 504.

<sup>3</sup> Starks v. Sikes, 8 Gray, 612.

of repairs which he has a right to make, nor from consequences resulting from extraordinary measures which were apparently necessary for the preservation of the common property. He may relieve himself from claims made against him in either case by his cotenant, by showing that his acts were necessary, and were performed with diligence and care, and were free from negligence.<sup>1</sup>

§ 266. **Negligence in the care and use of the common property** may result in its complete destruction, or in a mere depreciation of its value. In case of destruction through negligence, the cotenant in fault seems to be as liable to the other part owners as though the destruction were wilful.<sup>2</sup> A charge that a cotenant carried oats entrusted to his care in so negligent and careless a manner that the boat in which they were transported was filled with water and the oats lost, is equivalent to an averment that the oats were destroyed by such cotenant.<sup>3</sup> So turning a lot of hogs into the street, thus occasioning them to stray away and be lost renders the culpable cotenant liable as for a destruction.<sup>4</sup> On the other hand, one Judge has gone so far as to declare that "the clear result of the authorities is, that one joint owner of a ship or chattel is not responsible to the co-owners for the careless use of it. The other owners, if not satisfied to leave it in his care, must look themselves to the protection of their own property."<sup>5</sup> This very clear language was employed in a decision denying the liability of a part owner of a vessel, through whose negligence it took fire and was consumed. Very meagre and discordant are the authorities in reference to the possibility of liability arising against a part owner for any negligence on his part resulting in an injury, but not in a destruction of the subject of the tenancy. On one hand, it is held that a tenant in common is not liable "for negligence or misuse of the common property, nor for what he might have made by diligence;"<sup>6</sup> and on the other, it is said that if one tenant in

<sup>1</sup> *Boyton v. Rees*, 9 Pick. 530.

<sup>2</sup> *Chesley v. Thompson*, 3 N. H. 9; *Guillot v. Dossat*, 4 Mart. 203.

<sup>3</sup> *Herrin v. Eaton*, 13 Me. 196.

<sup>4</sup> *Sheldon v. Skinner*, 4 Wend. 525.

<sup>5</sup> *Moody v. Buck*, 1 Sandf. S. C. 308.

<sup>6</sup> *Hall v. Fisher*, 20 Barb. 448.



common misuse that which he has in common with another, he is answerable to the other in an action as for misfeasance.<sup>1</sup>

§ 267. **The owners of a party wall are not necessarily, nor even ordinarily, cotenants thereof.** They are not, therefore, in seeking redress from each other, fettered by any of the limitations as to liability or as to form of action which are imposed by law on cotenants. As long as the wall remains in condition fit for the use for which it was originally designed, and is not in a state which renders its continuance dangerous to life or property, neither of the parties has any authority to do any act which will impair the rights of the other or injure his person or property. If either undertake to underpin his part of the wall, he is certainly liable to the other for any damages resulting from the negligence or carelessness of himself or of his agents or servants. The cases undoubtedly go farther. They require the party underpinning or changing his portion of the wall to reimburse the other for all injuries occasioned thereby, whether the result of negligence or not. Whenever either party undertakes to change or undermine or increase the height of the wall, he does so at his own peril; and he must indemnify the other for any injurious consequences, though the undertaking be prosecuted with the utmost skill, diligence, and caution.<sup>2</sup> One of the owners of a party wall contracted with another person to make alterations, dig down the foundations, lower the floor, deepen the cellar, etc., and gave notice of these intended improvements to the tenant of the adjacent building, who assented thereto. In consequence of these alterations, the party wall settled, and the front and rear walls of the adjoining house were cracked. As a defense to an action to recover for these damages, the defendant insisted that he was not responsible for the negligence of the contractor who did the work. But the Court disposed of this defense as follows: "The cases relating to the liability of a person for the negligence of another, who stands to him in the relation of an independent con-

<sup>1</sup> *Martyn v. Knowllys*, 8 T. R. 146.

<sup>2</sup> *Eno v. Del Vecchio*, 4 Duer, 62; *Brown v. Windsor*, 1 Comp. & Jer. 20; *Bradbee v. Christ's Hospital*, 4 Man. & Gr. 714, 760; *Brooks v. Curtis*, 50 N. Y. 644.



tractor, and not of servant, have, we think, no application to the present case. Here one defendant employs and directs the other defendant to commit a trespass. Both are liable for the consequences jointly and severally. The question of negligence was wholly immaterial, or at least it was wholly unnecessary that the plaintiff should prove any negligence. The trespass was committed at the peril of being responsible for all the injury sustained by plaintiff."<sup>1</sup>

<sup>1</sup> *Eno v. Del Vecchio*, 6 Duer, 27.

## CHAPTER XIII.

### LEGAL REMEDIES BETWEEN COTENANTS.

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§ 268. **For Matters independent of the Cotenancy.**—The fact that two or more persons are cotenants imposes no restraints upon their dealing with one another, nor does it affect their legal or equitable remedies based upon any dealings between them, independent of the subject matter of the cotenancy. They are, like partners, at liberty to transact business with one another as individuals, and each, in his individual capacity, to pursue the ordinary legal or equitable means of redress for any violation by one of his individual engagements with the other.<sup>1</sup> Therefore, one may distrain for the rent due him from the other who is occupying the premises under a lease, entered into by himself, or acquired by assignment

<sup>1</sup> *Bond v. Hilton*, Busb. 309; *Ouston v. Ogle*, 13 East, 538.

from a lessee.<sup>1</sup> On the other hand, if one tenant is lessee of the other, or otherwise is entitled to exclusive possession of the whole or any part of the premises by virtue of a contract with the other, he has, on being disturbed in his occupation, the same remedies, as though he were not cotenant with his lessor.<sup>2</sup>

FOR RECEIPTS FROM THE COTENANCY AND FOR USE AND OCCUPATION.

§ 269. **Common Law furnished no adequate Remedy.**—The enforcement of the rights and the prevention of the wrongs of cotenants, arising out of the property in which they have a joint or common interest, bear a close resemblance to the enforcement of rights and the prevention of wrongs among copartners. The ascertaining of the relative liabilities to each other of joint owners or owners in common, whether they also happen to be partners or not, is of difficult accomplishment at law, as it usually requires the taking of an account between them. Therefore, the adjustment of the liabilities of cotenants to one another and the enforcement of their relative rights, have, when growing out of the common property, and not based upon the commission of some tort, been generally sought in courts of equity—those tribunals affording more convenient and adequate means of relief than the tribunals of the law. In fact, in all cases where the cotenants continued in possession, the common law seems to have provided no means by which either could recover anything from the other, who had taken more than his share of the rents and profits of the estate, unless such rents and profits were received by one as bailiff of the other. “If one joyntenant or tenant in common of land maketh his companion his baylife of his part, he shall have an action of account against him, as hath been said. But although one tenant in common or joyntenant without being made baylife taketh the whole profits, no action of account lieth against him; for in an action of account he must charge him as guardian, baylife or receiver, as hath been said before, which he cannot do in this case,

<sup>1</sup> *Luther v. Arnold*, 8 Rich. 26; *Snelgar v. Henston Cro.* Jac. 611; 2 Co. Rep. 212; *Cowper v. Fletcher*, 6 Best & S. 470; 118 E. C. L. 468.

<sup>2</sup> *O'Hear v. DeGoesbriand*, 33 Vt. 612; 4 Kent's Comm. 370.

unless his companion constitute him bailife. And therefore all those bookes which affirm that an action of account lieth by one tenant in common, or jointenant, against another, must be intended when one maketh the other his bailife, for otherwise never his bailife to render an account, is a good plea."<sup>1</sup>

§ 270. **Remedy by Statute of Anne.**—As cotenants were without any means of redress, when one of them had received more than his share of the rents or profits of the estate, the statute 4 and 5 Anne, ch. 16, was passed to remedy this defect in the common law. The 27th section of this statute enacted: "That from and after," etc., "actions of account shall and may be brought and maintained against the executors and administrators of every guardian, bailiff, and receiver; and by one joint-tenant, and tenant in common, his executors and administrators, against the other as bailiff, for receiving more than comes to his just share or proportion; and against the executor and administrator of such joint-tenant or tenant in common; and the auditors appointed by the Court, when such action shall be depending, shall be, and are hereby empowered to administer an oath, and examine the parties touching the matters in question, and for their pains and trouble in auditing and taking such account, have such allowance as the Court shall adjudge to be reasonable, to be paid by the party on whose side the balance of the account shall appear to be." Under this statute, wherever the relation of cotenancy exists, it creates the liability to account. But the action is not generally maintainable until after a demand, nor then, except at reasonable periods.<sup>2</sup> And where the custom of the country is to reckon the annual rents at annual periods or times, no doubt these times would be adopted as the reasonable times at which the cotenant receiving the rents is required to account.

§ 271. **Cotenant must bring his case within the Statute.**—In order to obtain the benefit of this statute, the plaintiff must clearly show that his case is one for which the

<sup>1</sup> Co. Litt. 209 b; 3 Rob. Pr. 171; Henderson v. Eason, 17 Ad. & El. N. S. 718; Wheeler v. Horne, Willes, 208.

<sup>2</sup> Barnum v. Landon, 25 Conn. 150.

statute was designed to afford a remedy. In the declaration it should be made to appear that the parties are cotenants, and also what their relative interests are. "This is necessary, in order that the judgment to account may show on what basis or rule of liability the defendant is to account; because a bailiff at common law is answerable, not only for what he has received as such bailiff, but also for what he might have made of the lands with proper diligence, or as some of the books say, what he might have made without his wilful fault; but under the statute, he is not liable beyond what he has received more than his just share or proportion."<sup>1</sup> It is not sufficient to show that the parties were cotenants, and that the defendant has received rents and profits: the additional fact must appear that the defendant has received *more than his proportion*.<sup>2</sup> "The declarations since the statute have always set forth that the defendant has received more than his share."<sup>3</sup> A declaration is sufficient which "states the plaintiff and defendant were tenants in common in undivided moieties, and that the defendant had the care and management of the whole, to receive and take the rents, etc., to the use and profit of plaintiff and defendant, and, as bailiff of the plaintiff, of what he had received more than his just share and proportion to render a reasonable account to the plaintiff;" and which, in addition, shows that defendant received more than his share.<sup>4</sup>

§ 272. The statute of Anne, as we have seen, gives a remedy by an action of account, in favor of one cotenant against another as bailiff, "for receiving more than comes to his just share or proportion." This statute has, in substance, been reenacted in several of the States. A very radical and evenly balanced difference of opinion has arisen in regard to what a cotenant may be compelled to account for, on the ground that in receiving it, he has received "more than comes to his just proportion." The cases in which the action

<sup>1</sup> *Hayden v. Merrill*, 44 Vt. 341.

<sup>2</sup> *Early v. Friend*, 16 Gratt. 52; *Hayden v. Merrill*, 44 Vt. 336; *Stuption v. Richardson*, 13 Mees & W. 21; *Irvine v. Hamlin*, 10 Serg. & R. 221; *Sargent v. Parsons*, 12 Mass. 149.

<sup>3</sup> *Wheeler v. Horne, Willes*, 210. See *Barnum v. Landon*, 25 Conn. 148.

<sup>4</sup> *Eason v. Henderson*, 12 Ad. & El. N. S. 996.

of account has been sought to be sustained under this statute divide themselves into two classes. In the first are comprised all cases in which the cotenant, sought to be called to an accounting, has received from a third person the rents or profits of the common property. The second class includes the cases in which the cotenant complained of has not received anything from third persons, but has directly appropriated to himself the use and enjoyment of all of the common estate, or of more than his proportion thereof.

§ 273. **Accounting for Receipts.**—The cases referred to in the preceding section, as being comprised within the first class, are unquestionably provided for by the statute of Anne, and by all statutes of like import. “Where one tenant in common actually receives the rents, issues, and profits, then he may be compelled to account for such profits actually received.”<sup>1</sup> If one of the cotenants make a lease of the entire premises as if he were a sole owner, the other cotenants are entitled to their *pro rata* of the rents.<sup>2</sup> And, so it is said, if a cotenant retain more than his share of the profits, he is compellable to account not only for the original profits, but also for such further profits as may have accrued to him from this use of the original profits.<sup>3</sup> Upon a leasing of his moiety by one of the cotenants, his lessee becomes liable to account to the cotenants of the lessor.<sup>4</sup>

§ 274. **For Profits made and for Use and Occupation.**—**English Rule.**—So far, we have encountered no conflict of authority as to what a cotenant must account for. But we shall now consider the liability of a cotenant who, though enjoying the whole, or more than his share of the common property, *receives* nothing from third persons, on its account. Here the harmony ends. We shall first show the rule prevailing in England, by quoting the main portion of the opinion of the Court in what seems to be the latest as well as the best considered case in that country: “It is to be observed that the statute does not mention lands or tenements, or any particular

<sup>1</sup> *Izard v. Bodine*, 3 Stock. 404; *Crow v. Mark*, 52 Ill. 332.

<sup>2</sup> *Pope v. Harkins*, 16 Ala. 324.

<sup>3</sup> *Huff v. McDonald*, 22 Geo. 161.

<sup>4</sup> *Barnum v. Landon*, 25 Conn. 152.

subject. Every case in which a tenant in common *receives* more than his share is within the statute: an account will lie when he does *receive*, but not otherwise. It is to be observed also that the receipt of *issues and profits* is not mentioned, but simply the receipt of more than comes to his share; and, further, he is to account when he *receives*, not *takes*, more than comes to his just share. What, then, is a *receiving* of more than comes to his just share, within the meaning of the statute of *Anne*?

“It appears to us that, construing the act according to the ordinary meaning of the words, this provision of the statute was meant to apply only to the cases where the tenant in common receives money or something else, where another person gives or pays it, which the cotenants are entitled to, simply by reason of their being tenants in common, and in proportion to their interests as such, and of which one receives and keeps more than his just share, according to that proportion.

“The statute, therefore, includes all cases in which one of two tenants in common of lands leased at a rent payable to both, or of a rent charge, or any money payment or payment in kind, due to them from another person, receives the whole or more than his proportionate share, according to his interest in the subject of the tenancy. There is no difficulty in ascertaining the share of each, and determining when one has received more than his just share, and he becomes, as to that excess, the bailiff of the other, and must account.

“But when we seek to extend the operation of the statute beyond the ordinary meaning of its words, and to apply it to cases in which one has enjoyed more of the benefits of the subject, or made more by its occupation than the other, we have insuperable difficulties to encounter. •

“There are obviously many cases in which a tenant in common may occupy and enjoy the land or other subject of tenancy in common solely, and have all the advantages to be derived from it, and yet it would be most unjust to make him pay anything. For instance, if a dwelling house, or barn, or room, is solely occupied by one tenant in common, without ousting the other, or a chattel is used by one cotenant in common, nothing is received; and it would be most inequit-



able to hold that he thereby, by the simple act of occupation or use, without any agreement, should be liable to pay a rent or anything in the nature of compensation to his cotenants for that occupation or use to which, to the full extent to which he enjoyed it, he had a perfect right. It appears impossible to hold that such a case would be within the statute; and an opinion to that effect was expressed by Lord Coltenham in *McMahon v. Burchell*.<sup>1</sup> Such cases are clearly out of the operation of the statute.

“Again, there are many cases where profits are made, and are actually taken, by one cotenant, and yet it is impossible to say that he has received more than his just share. For instance, one tenant employs his capital and industry in cultivating the whole of a piece of land, subject to the tenancy, in a mode in which the money and labour expended greatly exceed the value of the rent or compensation for the mere occupation of the land; in raising hops, for example, which is a very hazardous adventure. He takes the whole of the crops: and is he to be accountable for any of the profits in such a case, when it is clear that, if the speculation had been a losing one altogether, he could not have called for a moiety of the losses, as he would have been enabled to do had it been so cultivated by the mutual agreement of the cotenants? The risk of cultivation, and the profits and loss, are his own; and what is just with respect to the very uncertain and expensive crop of hops is just also with respect to all the produce of the land, the *fructus industriales*, which are raised by the capital and industry of the occupier, and would not exist without it. In taking all the produce, he cannot be said to receive more than his just share and proportion to which he is entitled as tenant in common. He receives, in truth, the return for his own labour and capital, to which his cotenant has no right.

“Where the natural produce of the land is augmented by the capital and industry of the tenant—grass, for instance, by manuring and draining—and the tenant takes and sells it, or where, by feeding it with his cattle, he makes a profit by it, the case seems to us to be neither within the words or spirit

<sup>1</sup> 2 Phillips Rep. 134.

of the act, though there are not cases of *fructus industriales* in either case."<sup>1</sup>

In the decision of Lord Chancellor Cottenham, referred to in the preceding quotation, his Lordship makes the further objection to holding that a cotenant may be called to account for use and occupation, that "the effect would be, that one tenant in common, by keeping out of the actual occupation of the premises, might convert the other into his bailiff; in other words, prevent the other from occupying them, except upon the terms of paying him rent. There is nothing in the acts of Parliament to lead to that conclusion, which is contrary to the law as clearly established from the time of Lord Coke downwards."<sup>2</sup>

§ 275. **American Cases affirming the English Rule.**—The construction of the statute of Anne, maintained by the most recent decisions in England, has been approved in the majority of instances in which it has been called in question in the United States. Indeed, some of our Courts seem to have preceded rather than followed the English adjudications upon this subject. Thus, in Massachusetts, as early as 1815, the Supreme Judicial Court denied a cotenant the right to an accounting against his companion "because the plaintiff had not charged the defendant with having received rents and profits, *otherwise than by his occupancy*."<sup>3</sup> In New York, where the defendant had had the sole occupation, for a period of five years, of a farm, the rent and occupation of which were worth \$200 per annum, and he was sued by his cotenants who were the owners of the undivided six-sevenths of the farm, the

<sup>1</sup> *Henderson v. Eason*, 17 Ad. & El., N. S., 701, 718. This case was decided in the Exchequer Chamber on appeal from the Court of Queen's Bench. The judgment of the last named Court (see *Eason v. Henderson*, 12 Ad. & El., N. S., 996) proceeded upon a very different theory from that adopted on appeal, as will be readily perceived by the following extract from the opinion of Lord Denman: "The case stated that he had occupied, and received the whole profits, but no part was underlet: he received no rent, nor anything but the profits derived from the culture of the lands, to the expense of which the plaintiff in no way contributed. It was contended that the defendant was not liable as bailiff, because it does not appear that he had received *rent*, and because it did not appear that he had received more than his just proportion. But we think the words 'rents, issues, or profits,' include the proceeds of the land, whether in money or in kind."

<sup>2</sup> *McMahon v. Burchell*, 2 Phill. 134.

<sup>3</sup> *Sargent v. Parsons*, 12 Mass. 152.

Supreme Court quoted and approved the opinions pronounced in *Henderson v. Eason* and in *McMahon v. Burchell*.<sup>1</sup> The same cases have been approved in Indiana and Missouri, and applied to legal controversies arising under a statute substantially like the statute of Anne.<sup>2</sup> In New Jersey, the general principle is affirmed that “where one tenant in common occupies the whole estate, without claim on the part of his cotenants to be admitted into possession, he is under no obligation to account—for he had a right to such occupancy.”<sup>3</sup> But, according to the views of this Court, this general rule does not extend to a case where the property was valuable to rent as an entirety, and an opportunity was offered to so rent it, which could not be accepted owing to the refusal of one of the cotenants to join in the lease; and such cotenant took and retained exclusive possession of that part most useful to himself. The fact that the conduct of the defendant prevented an advantageous lease, that his mode of occupancy was of a character to exclude plaintiff from participating in the enjoyment of it, together with “other considerations connected with the ownership and occupancy of the property, and the conduct of the defendant in regard to it,” induced the Court, “to consider the occupancy of the defendant as an *ouster* of the complainant, and to make it proper that the defendant should account with the complainant for the portion of the premises the defendant exclusively occupied.”<sup>3</sup> At quite an early day, the Court of Appeals of the State of Kentucky, in considering the effect of the statute of Anne, and of a similar statute of Virginia, arrived at about the same conclusions sustained by the most recent English decisions. “These statutes,” said the Court in Kentucky, “were not designed to create a right in favor of a cotenant who expended nothing, to share the profits resulting from the money or labor expended by his companion; but they were intended to give a remedy, by which the profits of the estate, growing out of its condition when acquired, or which the estate yielded, or would yield, independent of any extraordinary expenditure by the party

<sup>1</sup> *Woolever v. Knapp*, 18 Barb. 265. See also, to same effect, *Dresser v. Dresser*, 40 Barb. 300; *Wilcox v. Wilcox*, 48 Barb. 327; *Scott v. Guernsey*, 60 Ib. 163.

<sup>2</sup> *Crane v. Waggoner*, 27 Ind. 52; *Ragan v. McCoy*, 29 Mo. 367.

<sup>3</sup> *Izard v. Bodine*, 3 Stock. 404.

receiving the profits, might be-apportioned according to the interests of the cotenants."<sup>1</sup> In California, the decision in *Henderson v. Eason* has been approved, though it is said that the statute of Anne has never been adopted as part of the law of that State.<sup>2</sup>

§ 276. But in some of the United States, the statute of Anne has received a different interpretation from that adopted in England. A case arose in South Carolina, where the subject of the tenancy consisted of about eight hundred acres of land, of which between three and four hundred acres were in condition for cultivation. One of the cotenants entered upon the whole land, and proceeded to cultivate that which was in condition for cultivation, and to clear and improve the balance; and after it was so improved, proceeded to cultivate it as he did the rest. Being called upon to account to the cotenant not in possession, the defendant contended that he was not chargeable, because he did not *receive* any rent. But the Court held that "to cultivate and have the use of lands, is to receive the rents and profits, though the occupier is his own tenant;" that to ascertain what rents he should be charged with, the Court would inquire into the condition and rental value of the land when it was first made the subject of exclusive possession. Therefore, the defendant was required to account for the rents of all the land which was in condition for cultivation when he took possession, but was excused from accounting for that portion which by his own exertions was made capable of producing rent.<sup>3</sup> In Virginia, the Code<sup>4</sup> contains a provision substantially like the statute of Anne. The Supreme Court of Appeals, in determining a case arising under this Code, considered the decisions in England, and dissented therefrom, giving its reasons as follows:

"What, then, is the meaning of the words in our statute 'for receiving more than comes to his just share or proportion?' What did the Legislature intend by the use of those words? Did they only intend to make a tenant in common

<sup>1</sup> *Nelson's Heirs v. Clay's Heirs*, 7 J. J. Marsh. 141.

<sup>2</sup> *Pico v. Columbet*, 12 Cal. 419; *Goodenow v. Ewer*, 16 Cal. 471.

<sup>3</sup> *Thompson v. Bostwick*, 1 McMullan's Eq. 75. See also *Holt v. Robertson*, Ib. 475; *Volentine v. Johnson*, 1 Hill Ch. 49.

<sup>4</sup> Code, p. 586, ch. 145, sec. 14.

accountable to his cotenants for receiving from a stranger on account of rents and profits of the property more than the just share or proportion of such tenant? Or did they intend to make him accountable for receiving more than his just share or proportion of the rents and profits, whether paid by a stranger or derived from his own occupation and enjoyment of the property? I think they intended the latter. The former construction may be a reasonable one in England, where the ordinary mode of deriving profit from real estate is by renting it out; but not in this State, where real estate is generally occupied and used by the owner. With all deference to the Court of Exchequer Chamber, I think the construction they put upon the word '*receiving*' is too technical and narrow, at least for our country; and if it be a just one in England, it is because of circumstances existing there which do not exist here. I do not see the force of the distinction drawn by that Court between the words '*receive*' and '*take*' in this connection. I think the word '*receiving*' in the statute literally means a receiving of profits as well by use and occupation as renting out the property. At all events, there is, in substance, no difference between them, and the former is as much within the reason and the meaning of the law as the latter. If a tenant in common rent out the property and receive more than his just share of the rent, he is accountable for the excess to his cotenants. Why should he not be alike accountable when, instead of renting out the property, he solely occupies and uses it, and thus receives more than his just share of the profits? Why should he be told, 'If you rent out the property and receive the rent, you must share it with your cotenants; but if you solely occupy and use it and take all the profits, you will not be accountable to them.' Would he hesitate between these alternatives?"<sup>1</sup> In Vermont, in a very recent decision, and after a thorough examination of the authorities, the Supreme Court announced its intention to depart from the English rule. "We will not attempt to lay down any particular rule as a general test of liability of one tenant in common occupying the common property. But it

<sup>1</sup> *Early v. Friend*, 16 Gratt. 47; *Ruffners v. Lewis' Exrs.* 7 Leigh, 720; *Graham v. Pierce*, 19 Gratt. 88.

is safe to say that where, as in this case, the occupancy of a tenant in common is beneficial, and at a profit to such occupant, and is entire and exclusive, he is bound to account to his cotenant for what he has received by such occupancy more than his just proportion."<sup>1</sup>

§ 277. **Only for Balance Due.**—In considering the matters for which a cotenant must account to his fellow-tenant, we have not devoted any attention to demands in the nature of counterclaims which the defendant may bring forward to reduce the amount of the charges against him. "It is not enough for the plaintiff to show that the defendant has taken more than his proportion of a single article raised on the estate, but it must be made to appear that he has received more than his aliquot part of the proceeds of all the profits of the common property, after deducting all reasonable charges. There must be a balance due, at the commencement of the plaintiff's action, in the hands of the defendant, as the result of a final settlement of the account between the parties relating to the estate owned in common."<sup>2</sup>

§ 278. **Among the reasonable charges for which the defendant will be allowed as an off-set are included all sums paid for taxes or assessments, or for keeping the premises in ordinary repair;**<sup>3</sup> also necessary disbursements made "for the recovery, defense, or protection of the joint property,"<sup>4</sup> but not the law expenses of adverse suits between the tenants in common themselves."<sup>4</sup> If the cotenant who calls for the accounting is indebted to the other for a sum advanced in purchasing the estate, the latter is entitled to have the sums for which he is liable applied, first to the payment of interest which had accumulated when such liability accrued, and next to the payment of the principal sum.<sup>5</sup>

§ 279. **Improvements made by one cotenant independent of any agreement so to do, may sometimes be proper**

<sup>1</sup> *Hayden v. Merrill*, 44 Vt. 348. See, to same effect, *Shiels v. Stark*, 14 Geo. 435.

<sup>2</sup> *Shephard v. Richards*, 2 Gray, 427.

<sup>3</sup> *Hannan v. Osborn*, 4 Paige, 343; *Dech's Appeal*, 57 Pa. St. 472.

<sup>4</sup> *Lewis and Nelson's Appeal*, 67 Pa. St. 169.

<sup>5</sup> *Volentine v. Johnson*, 1 Hill Ch. 50.

matter to be considered in taking an account.<sup>1</sup> But, under what circumstances, and to what extent, improvements may be considered in taking an account between cotenants cannot be stated with desirable precision. It is probable, however, that they will not be made a subject of compensation unless they are of a usual character, and are necessary for the ordinary and economical use of the property. But when the property is intended by the co-owners to be devoted to a special purpose, allowance may be made for such improvements as intelligent and sagacious men know will greatly tend to accomplish the purpose desired.<sup>2</sup>

§ 280. *Assumpsit, where allowed and for what.*—At quite an early day, the Supreme Judicial Court of the State of Massachusetts determined that the provisions of the statute of Anne, giving the action of account, necessarily, by authorizing such action, also authorized an action of *assumpsit*. The Court arrived at this conclusion, on the grounds: 1st, that whenever account can be maintained, *indebitatus assumpsit* may also; and 2d, that the statute, being remedial, ought to receive a liberal construction. “It [the statute] was enacted to provide a relief which could not be had at common law; and the mode pointed out by action of *account* ought to be considered as put by way of example, not of limitation.”<sup>3</sup> The decision thus made has been reëffirmed in many subsequent decisions in the same State; and the principles there enounced have been applied to a great variety of cases. Thus, in one instance *indebitatus assumpsit* was maintained for money had and received—the gravamen of the action being that the defendant had received and retained more than his share of the profits arising from the use of a machine of which he and the plaintiff were cotenants.<sup>4</sup> In another case, the same form of action was successfully employed by one part owner of a vessel to recover his share of compensation received by another part owner for services during a previous voyage.<sup>5</sup> In the same form of action, a

<sup>1</sup> Nelson v. Leake, 25 Miss. 199; Ruffners v. Lewis, 7 Leigh, 743.

<sup>2</sup> Reed v. Jones, 8 Wis. 464.

<sup>3</sup> Jones v. Harraden, 9 Mass. 540.

<sup>4</sup> Brigham v. Eveleth, 9 Mass. 541; Moses v. Ross, 41 Me. 360.

<sup>5</sup> Fanning v. Chadwick, 3 Pick. 420.



tenant in common of certain real estate obtained his proportion of money received by his cotenant for wood grown upon the land and sold by the latter.<sup>1</sup> And so, in the same State, rents and profits may be recovered in assumpsit against a cotenant. "It seems very clear that, in ordinary cases, where one tenant in common has received the whole or the greater share of the rents, his cotenant may have an action of assumpsit, and that this is the appropriate if not the sole remedy at law which he can have."<sup>2</sup> In the same State, "Money expended by the plaintiff to pay off a common incumbrance necessary to be removed to discharge their joint covenants, must equally be the proper subject of an action of assumpsit by one tenant in common against his cotenant."<sup>3</sup>

§ 281. The rule adopted in Massachusetts has been wholly or partially approved and acted upon in several other States. Thus, in Maine, "It is now well settled law, that where one tenant in common has received from others rents and profits of the common property, he is accountable in an action of assumpsit to his cotenant for his share."<sup>4</sup>

§ 282. In Michigan, an extreme position has been taken: one which sanctions the employment of the action of assumpsit to recover the value of the plaintiff's interest in severable chattels, which the defendant took in his exclusive possession and refused to permit plaintiff to sever his share. The facts of this case were that grain was grown on the shares on defendant's lands by one Jarvis. The latter mortgaged the crops to plaintiff, who caused them to be harvested. The grain was then put in the granary of the defendant, who thereafter refused to recognize plaintiff's rights, or to allow him to take his share. Upon those facts, the action brought by the plaintiff was sustained, and in so sustaining it the Court reasoned as

<sup>1</sup> *Miller v. Miller*, 7 Pick. 136.

<sup>2</sup> *Munroe v. Luke*, 1 Met. 464; *Shephard v. Richards*, 2 Gray, 424.

<sup>3</sup> *Dickinson v. Williams*, 11 Cush. 260. In New Brunswick, a cotenant is liable in an action of money had and received for selling more than his share of the property of the cotenancy. *Shaw v. Grant*, Ber. 110; *Doyle v. Taylor*, Id. 201. But he is not liable in such an action for receiving more than his share of the rents unless the account has been settled and a balance struck. *Frost v. Disbrow*, 1 Han. 73.

<sup>4</sup> *Buck v. Spofford*, 40 Me. 328; *Gowen v. Shaw*, 40 Me. 58; *Dyer v. Wilbur*, 48 Me. 287.



follows: "The question then arises, whether an action properly lies in *assumpsit*. It is said, in several of the cases, that, where property has been tortiously taken, and converted by *sale*, the owner may affirm the sale, and sue for the proceeds in *assumpsit*; but that where there has been a conversion without sale, the tort cannot be waived. It certainly is somewhat anomalous to place parties in contract relations against their will, where no privity exists; and the cases where it is permitted, seem to be justified only on the ground that no prejudice can result to the defendant by allowing it. But where a party commits a breach of duty, which the law implies from his express contract, *assumpsit* is as appropriate a remedy as any other, if a plaintiff sees fit to resort to it. The plaintiffs here derived their rights, as tenants, from the contract of defendant with their grantor, creating the tenancy. The grain being in a marketable condition, the cotenant in possession was bound, on reasonable request, to have the plaintiffs' share measured out for them. His own contract precludes him from claiming more than his proportional amount. When he concludes to retain the remainder, he is certainly bound to pay for it; and the plaintiffs may, by their consent, convert the transaction into a sale; as it would have been a sale originally, had such consent been given at the time. We think no principle of law is violated by allowing the action to be maintained in its present form."<sup>1</sup>

§ 283. The Courts of Pennsylvania also approve of the action of *assumpsit*, as a remedy to recover rents or profits received, beyond his proportional share, by either of the cotenants, and also for the recovery for any other breach of engagement, express or implied, in regard to the common property. Thus, in one case in that State, an action in *assumpsit* was instituted to recover the value of a quantity of lumber, taken and disposed of by the defendant. The evidence established that the plaintiff and the defendant were tenants in common of a tract of land on which a saw-mill was situated. A quantity of lumber, to which plaintiff and defendant were entitled as rent for the mill, was taken by the

<sup>1</sup> *Fiquet v. Allison*, 12 Mich. 829.

latter on an agreement that the plaintiff should have a like quantity at the mill in the ensuing spring. The defendant, instead of having the lumber at the mill the next spring, as he agreed to do, took and disposed of it. The Court had no hesitation in saying that "the plaintiff was entitled to maintain this action, on the ground that the defendant had broken his promise and engagement made with the plaintiff in the most express terms;" and further, that, in the absence of an express contract, if the defendant had taken all the lumber coming as rent and sold it, "he would unquestionably have been accountable to the plaintiff for his proportion of it, in *assumpsit*, for money had and received."<sup>1</sup> In a more recent case in the same State, the defendant insisted that plaintiff must resort to an action of account to recover his share of rents received. The Court said: "Account render has not been a favorite in modern times. The practitioner of the present day is as much repelled as the ancient lawyer was attracted by its cumbrous machinery and want of speed. Formerly, it applied to bailiffs, partners, and by statute 4 and 5 Anne, to tenants in common. Against a bailiff, who refuses an account, it remains a successful remedy; and those who are fond of the action, may enjoy here all the happiness it is capable of imparting." After some further remarks, the Court determined "to allow common sense another triumph, by holding the present action maintainable."<sup>2</sup>

§ 284. **Assumpsit in New York.**—The decisions referred to in the preceding section are, in their general tenor, at variance with the law as understood in England, and as interpreted in some parts of the United States. But before considering the English rule and the American decisions in accord with it, we shall refer to the adjudications upon this subject in the State of New York, and show that they are not in entire harmony either with the English decisions nor with those of the American Courts which have followed the conclusions sustained by the judicial tribunals of Massachusetts. One of the early cases in New York states that, as between tenants

<sup>1</sup> *Gillis v. McKinney*, 6 Watts & S. 78.

<sup>2</sup> *Borrell's Administrator v. Borrell*, 33 Penn. St. 494.

in common, "in case of a sale by one, and a receipt of the money, an action for money had and received will lie."<sup>1</sup> A little later in the same State an action of *assumpsit* was sustained by one cotenant for his share of money received by the other, and being the whole amount of damages assessed for the land owned in common, and taken for the construction of a canal. No difficulty in sustaining the action seemed to be felt by the Court. The only part of the opinion having reference to this branch of the case asserts that: "It is only necessary to say that the defendant had received from the State payment for a piece of property, which was owned half by himself and half by plaintiffs. Clearly, therefore, half the money which he thus received was received to the use of the plaintiffs."<sup>2</sup> So the Court of this State experienced no difficulty in sustaining an action of *assumpsit* for money had and received, to recover the plaintiff's share of money received by defendant from the sale of a piece of real estate of which plaintiff and defendants were tenants in common. This was treated as a very clear matter. The Court, according to the report, disposed of it by saying: "There can be no doubt, that where two tenants in common sell and convey their land, and all the money is received by one, the other can maintain an action for money had and received, for his moiety against the other."<sup>3</sup> This case may be supported on the ground, that, from the sale of the real estate, the relation of cotenancy had terminated; or upon the better ground, that there being but one sale and one receipt of money, and therefore but one item, no necessity for adjusting any account was shown. But so far as rents received are concerned, it seems that no action in *assumpsit* can be sustained by one cotenant against another in New York. In that State, an agent of a guardian of two tenants in common collected the rents of the entire estate. In an action by such agent against the remaining cotenant, the latter attempted to assert, as a set-off, his claim for one-third of these rents. The Court, speaking by its Chief-Justice, rejected the set-off, on the following grounds: "The

<sup>1</sup> *Seldon v. Hickock*, 2 Cai. 167.

<sup>2</sup> *Brinckerhoff v. Wemple*, 1 Wend. 478.

<sup>3</sup> *Coles v. Coles*, 15 Johns. 161. See also *Dodge v. Clyde*, 7 Rob. 412.

plaintiff was guardian, or rather agent of the guardian, of two of the tenants in common owning the property in question. He had power, in their right, to receive the whole of the rents, unless notice had been given by the defendant to the terre-tenant not to pay him the defendant's share. The rents received by him were properly received; and the question then is, whether one tenant in common can maintain assumpsit against his cotenant for his proportion of the rents. That such an action could not be sustained was the reason for providing by statute for the action of account. My conclusion, therefore, is, that the defendant's remedy is in another Court, or by the action of account in this Court."<sup>1</sup> While the Courts of this State denied the right of a cotenant to maintain assumpsit for his share of the rents and profits of real estate, they permitted him, by such an action, to recover the hire or profits of personal property, especially where, in the absence of complicated accounts, no reason existed for compelling him to resort to the action of account or to a bill in chancery. In the action in which this decision was obtained, the plaintiff and the defendant were owners of a schooner, employed in navigating Lake Ontario. The defendant chartered the vessel to a third person, and received most of the money. The plaintiff brought assumpsit for money had and received, to recover his moiety; and the defendant interposed the objection, that the plaintiff's remedy was by an action of account or by a bill in equity. The Court thought that, as by previous decisions, a rule had been established which affirmed the right of a cotenant to recover his moiety on the *sale* of a chattel, the principles supporting this rule should govern the case of the hiring of a *chattel*. "The one is a sale of the whole interest in the chattel; the other a virtual sale of the interest for a year. If the remedy be appropriate in one case, it seems equally so in the other."<sup>2</sup> It is evident that the reasoning on which this last decision is based must, if correct, overthrow the doctrine affirmed in the preceding case of *Sherman v. Ballou*. That a cotenant of a chattel may recover in an action of assumpsit against his com-

<sup>1</sup> *Sherman v. Ballou*, 8 Cow. 310, decided in 1828.

<sup>2</sup> *Cochran v. Carrington*, 25 Wend. 409, decided in 1841.

panion in interest his moiety of the proceeds of the sale of such chattel, is a rule of law which, though well settled in the State of New York, is not established more conclusively in the Courts of that State than the other rule, that a cotenant of real estate may sustain a like action for the purpose of recovering his moiety of the fruits of the sale of such real estate. Such being the case, why may we not apply the language of the Court to an action of assumpsit for rents, or, in other words, for the proceeds of a lease; and, comparing it with a like action for the proceeds of a sale of realty, say: "The one is a sale of the whole interest; the other a virtual sale of the interest for a year. If the remedy be appropriate in one-case, it seems equally so in the other."

§ 285. In England, the statute of Anne, giving the action of account against a cotenant, is not understood as authorizing an action for money had and received. The reason assigned for this ruling is, that in an action of account, the cotenant being proceeded against as a bailiff, is entitled to the rights and indemnities of a receiver, and consequently should, as a defense to such action, be allowed to show a losing of the money without his fault; "whereas, in an action for money had and received to the use of another, the defendant is liable for the money absolutely. It is clear, therefore, that the statute of Anne only gives an action of account, in which the receiver would be entitled to all just allowances; and if so, that this action for money had and received will not lie." The Court also considered "the case of a tenant in common who receives the whole of the rent due to himself and his companion as analogous to the case of tenant in common taking the whole of a chattel into his possession; in which case, neither trespass nor trover lies against him."<sup>1</sup> The position taken in England has been assumed and sustained in several States of the Union. In Tennessee, it has been held that a tenant in common cannot sue his cotenant for rents received by the latter.<sup>2</sup> A similar conclusion is announced by a recent decision in Illinois.<sup>3</sup> In Maryland, a tenant in

<sup>1</sup> *Thomas v. Thomas*, 5 Exch. 32. See also *Crossfield v. Such*, 8 Exch. 828.

<sup>2</sup> *Terrell v. Murray*, 2 Yerg. 384.

<sup>3</sup> *Crow v. Mark*, 52 Ill. 332.

common sued his cotenants in assumpsit to recover for services rendered by him, as auctioneer and real estate broker, in making sale of the common property, and for money expended in advertising the property for sale. The opinion of the Court, disposing of this case, quotes and approves the rule laid down in *Browne on Actions*, that "joint-tenants, tenants in common, and coparceners, cannot, in general, maintain any action against each other, *because they are in the nature of partners.*"<sup>1</sup> After referring to a number of decisions, all of which were rendered in suits between copartners and affirmed the general rule that one partner cannot sue another at law, the Court said: "It is impossible to distinguish the present case, in principle, from those just cited. The services rendered by the plaintiff, for which he seeks to recover in this action, were done during the continuance of the tenancy in common, on account of the whole common property, and enured to the benefit of all the joint-owners, and if performed by a stranger, the suit would have been against the four jointly, and the plaintiff must have contributed his proportionate share towards paying for them. The same reason, therefore, holds against his right to maintain this action."<sup>2</sup>

§ 286. **Assumpsit for Use and Occupation.**—Whether an action of assumpsit for rents and profits of the common property or for the proceeds of the sale thereof can be sustained or not, it is certain that no such action can be maintained upon an implied promise to pay for the use and occupation of any part of the land exclusively used and occupied by either cotenant.<sup>3</sup> This is probably not so much the result of an objection to the *form* of action, as to the manifest inconsistency of the *cause* of action in assumpsit with the rights and relations of the cotenants. Each cotenant is entitled to be in possession, and to use every part of the common property, so long as he does not exclude his cotenant. Therefore, it is not reasonable to presume that a cotenant, who has, without deny-

<sup>1</sup> *Browne on Actions at Law*, 132; 1 *Chitty's Pl.* 39.

<sup>2</sup> *Hamilton v. Conine*, 28 Md. 640.

<sup>3</sup> *Kline v. Jacobs*, 68 Pa. St. 57; *Wilbur v. Wilbur*, 13 Met. 404; *Peck v. Carpenter*, 7 Gray, 283; *Webster v. Calef*, 47 N. H. 294; *Mussey v. Holt*, 24 N. H. 248; *Gower v. Shaw*, 40 Me. 58.

ing the rights of his companion, been in the full and exclusive possession, and in so being has been in the enjoyment of nothing beyond his legal rights, has entered into any engagement, express or implied, to account for the profits of such possession.

FOR POSSESSION OF CHATTELS.

§ 287. **No Remedy at Law.**—"If two be possessed of chattells personalls in common by divers titles, as of a horse, an oxe, or a cowe, &c., if one take the whole to himselfe out of the possession of the other, the other hath no remedie but to take this from him who hath done to him the wrong to occupie in common, &c., when he can see his time. In the same manner it is of chattells realls, which can not be severed, as in the case aforesaid, where two be possessed of the wardship of the bodie of an infant within age, if the one taketh the infant out of the possession of the other, the other hath no remedie by an action of the law, but to take the infant out of the possession of the other when he sees his time."<sup>1</sup> This general rule, as laid down by Littleton, remains in force at the present day, in the absence of the destruction or conversion of the common property, except so far as modified by statutory enactment in some of the United States.<sup>2</sup>

§ 288. **Detinue.**—A tenant in common, joint-tenant, or coparcener, cannot sustain an action of detinue against any of his cotenants for the possession of the subject matter of the cotenancy. This rule does not depend on any objection to this *form* of action. It is based upon that equality of rights incident to all cotenancies, by which every cotenant is equally entitled to the whole possession of the joint property, and no cotenant has such superior rights that the law will interfere in his behalf to wrest the possession from another who is equally entitled thereto.<sup>3</sup> So if several co-owners concur in delivering a chattel to a third person, he is entitled to

<sup>1</sup> Litt., sec. 328.

<sup>2</sup> Cowles v. Garrett, 30 Ala. 341; Hinds v. Terry, Walker, 80; Tinney v. Stebbins, 28 Barb. 290.

<sup>3</sup> Campbell v. Campbell, 2 Murph. 65; Bonner v. Latham, 1 Ired. 271; Carlyle v. Patterson, 3 Bibb. 95; Lewis v. Night, 3 Litt. 223.



retain it until all ask him to surrender it. "If one could on his own account ask him to have it returned to him, and maintain an action if it was refused, another might do the same; and so the bailee of the chattel might be harassed by as many actions as there might be joint-owners of the chattel."<sup>1</sup> Neither can any person, by this action, recover a deed, or other muniment of title, from another, equally entitled to its custody, whether they happen to be cotenants, or merely persons holding in severalty, but deriving their titles through the same conveyance.<sup>2</sup>

§ 289. **Replevin.**—The same reasons which compel Courts to deny a cotenant any redress against his companion in interest, by an action of detinue, operate with equal force against an action of replevin. To sustain replevin, the plaintiff must, at least as against the defendant, be entitled to the sole possession of the property sought to be recovered. This is never the case between joint-tenants, tenants in common, nor coparceners. Hence, neither can have an action against the other for the possession of the common chattels.<sup>3</sup> Therefore, an officer levying upon the chattels of one cotenant, and thereby succeeding to the latter's right of possession, is not liable to have his possession disturbed by an action of replevin brought by another cotenant.<sup>4</sup> "Until there is a severance, no one of the owners can by law sustain a claim to the exclusive possession of the chattel. If such were not the rule of law, and there were six owners in joint-tenancy or in common, five of these owners might institute their separate actions of replevin against the sixth cotenant, each claiming the possession by his suit, and each might obtain a judgment for the restoration of the property, or damages to its value."<sup>5</sup> The rule that one cotenant cannot have an action of replevin against

<sup>1</sup> *Atwood v. Ernest*, 22 L. J. Rep. (N. S.) C. P. 225; 17 Jur. 603; 24 E. L. & Eq. 262.

<sup>2</sup> *Clowes v. Hawley*, 12 Johns. 484; *Foster v. Crabb*, 12 Com. B. 149; 16 Jur. 835; 21 L. J. C. P. 189; *Yea v. Field*, 2 T. R. 708.

<sup>3</sup> *Hunt v. Chambers*, 1 Zab. 623; *Holton v. Binns*, 40 Miss. 491; *Barnes v. Bartlett*, 15 Pick. 75; *McEldery v. Flannegan*, 1 H. & G. 308; Litt., sec. 823; *Prentice v. Ladd*, 12 Conn. 333; *Chinn v. Respass*, 1 Monr. 25; *Hardy v. Sprowle*, 32 Me. 323; *Russell v. Allen*, 13 N. Y. 173; *Silloway v. Brown*, 12 Allen, 30; *Reeves v. Morris*, 2 Jebb & Symes, 344; *Davis v. Lottich*, 46 N. Y. 396; *White v. Merton*, 22 Vt. 15.

<sup>4</sup> *Ladd v. Billings*, 15 Mass. 17.

<sup>5</sup> *Prichards' Admr. v. Culver*, 2 Harr, 129.



another, is as applicable to ships and vessels as to any other species of personal property.<sup>1</sup> If, by virtue of a writ issued in an action of replevin, the plaintiff obtain possession of the property, and the trial discloses that he and the defendant are cotenants, he must surrender to the defendant the exclusive possession of *all* the property taken under the writ.<sup>2</sup>

FOR POSSESSION OF REAL ESTATE.

§ 290. **The action of ejectment is an appropriate remedy whenever either of the cotenants has been ousted by the other from the lands of the cotenancy, or any part thereof.**<sup>3</sup> The chief difficulty in an action of ejectment brought by one cotenant against another is in determining whether the defendant has been guilty of such a violation of the plaintiff's rights as constitutes an ouster.

§ 291. **Necessity of Ouster.**—There are a few authorities which declare, in general terms, that one tenant in common may maintain ejectment against his cotenant, though no actual ouster be proved.<sup>4</sup> These general declarations, as we apprehend, do not indicate any conflict of judicial opinion on this subject. Their apparent dissent from the well established rule of law, that an ouster is requisite to an action of ejectment, is in all probability the result of the employment of the word “ouster” as necessarily signifying an actual expulsion by force. If that were its only signification, then instances might frequently arise where a tenant in common could sustain an action of ejectment against his cotenant without showing an ouster. But, at least between cotenants, the term “ouster” may denote either an actual turning out, or an exclusive possession connected with some act amounting to a total denial of the rights of the cotenant who is out of possession. The fact of ouster, in one or the other of these senses, is a prerequisite to the right of each cotenant to

<sup>1</sup> *Wetherell v. Spencer*, 3 Mich. 123; *Rogers v. Arnold*, 12 Wend. 30; *Prentice v. Ladd*, 12 Conn. 331.

<sup>2</sup> *Russell v. Allen*, 13 N. Y. 176.

<sup>3</sup> *Adams on Ejectment*, 135.

<sup>4</sup> See remark of Spencer, J., in *Shepherd v. Ryers*, 15 Johns. 501; *Eads v. Rucker*, 2 Dana, 111.

maintain an action of ejectment against his fellow-tenant,<sup>1</sup> The question whether a given state of facts, as between cotenants, constitutes an ouster, arises: 1st, where the defendant claims that he is not subject to any action in ejectment for the reason that his possession is *consistent* with plaintiff's rights; and 2d, where the defendant claims that his possession has been so *inconsistent* with plaintiff's rights as to grow into a perfect title in severalty by virtue of the Statute of Limitations. In whichever of these two forms an issue in regard to ouster arises, its determination is a question of fact for the jury.<sup>2</sup> Nevertheless, a great number of decisions are embodied in the reports, by the aid of which we are generally enabled to satisfy ourselves whether a given state of facts constitutes an ouster. We have already considered these decisions in the chapter upon the ouster of one cotenant by another.<sup>3</sup>

§ 292. **Proof of Ouster, when not required.**—While an ouster is essential to the maintenance of an action of ejectment by one tenant in common against another, yet the circumstances of the case or the condition of the pleadings may be such as to concede the fact of ouster, and thus to dispense with proof of its existence. If the defendant by his answer claim the whole premises in his own right as owner thereof in severalty, he releases the plaintiff from the necessity of proving an ouster at the trial.<sup>4</sup> “We incline strongly to the opinion that the denial in the defendant's answer of all right, title, and interest in the plaintiff is an admission that his own possession is adverse, and may therefore well be treated as equivalent to a confession of ouster, superseding the necessity of proof on the trial.”<sup>5</sup> The law of ouster, as between

<sup>1</sup> Sigler v. Van Riper, 10 Wend. 419; Ewald v. Corbett, 32 Cal. 499; Story v. Saunders, 8 Humph. 668; Higbee v. Rice, 5 Mass. 351; Cutts v. King, 5 Greenl. 482; Cross v. Robinson, 21 Conn. 385; Gilchrist v. Ramsay, 27 U. C. Q. B. 500; Taylor v. Hill, 10 Leigh, 457; Carpentier v. Mendenhall, 28 Cal. 485; Halford v. Tetherow, 2 Jones, 393.

<sup>2</sup> Clark v. Crego, 47 Barb. 617; Carpentier v. Mendenhall, 28 Cal. 487.

<sup>3</sup> See sec. 221 to 244.

<sup>4</sup> Henderson v. Cotter, 15 Upper Canada Q. B. 345; Harrison v. Taylor, 33 Mo. 211; Noble v. McFarland, 51 Ill. 229; Scott v. McLeod, 14 Upper Canada Q. B. 575; McCallum v. Boswell, 15 Id. 343.

<sup>5</sup> Clason v. Rankin, 1 Duer, 341.

cotenants, was thus clearly and forcibly stated by Judge Scott, in the Supreme Court of Missouri: "The law of ouster in an action of ejectment between cotenants, wherein the one denies that the other ever had any title to the disputed premises, must be the same as in an action between those who are connected by no such relation. If the defendant wanted the benefit of the facts assumed in her instruction, why in her answer did she not disclaim to hold adversely to the plaintiffs? She would in one breath deny that the plaintiffs are her cotenants, and in the other claim the benefit of the relation. Where one cotenant seeks to bar another on the ground of adverse possession, the law requires proof of unequivocal facts showing an actual ouster. So, where the title of plaintiff is not disputed by the defendant, and the case turns on the fact whether there has been a disseizin of one cotenant by another, the plaintiff must show an actual ouster, or that some act was done by the defendant amounting to a total denial of the right of the plaintiff as a cotenant. But in an action where the cotenancy is denied ever to have existed, there is no reason why stronger evidence of an ouster should be required of one claiming as cotenant than any other party. By filing such an answer as was put in in this case, an act was done which showed that the defendant made a total denial of the right of the plaintiffs as cotenants."<sup>1</sup>

§ 293. **What Judgment Plaintiff may have.**—The recovery of the plaintiff must be consistent with the title upon which it is based. If he has an undivided interest, his recovery against another person having a like interest must not be for the possession of the lands in entirety, but that he be let into possession with the defendant.<sup>2</sup> He is equally entitled to such joint possession, and equally denied the right to exclusive possession, whether his moiety is so large as to almost include the whole, or so small as to grow infinitesimal when compared with the entire tract. Therefore, so far as the judgment to be entered in an action of ejectment is concerned, the relative interests of the plaintiff and defendant are perfectly immaterial; but as this judgment may, and in

<sup>1</sup> Peterson v. Laik, 24 Mo. 543.

<sup>2</sup> Ewald v. Corbett, 32 Cal. 499; Tevis v. Hicks, 33 Cal. 234.

all probability will, be succeeded by an action for mesne profits, it is proper for the Court before which the ejectment suit is tried to ascertain and settle the respective interests of the parties.<sup>1</sup>

§ 294. **Where Interest of Plaintiff is less than that sued for.**—The plaintiff may recover, though the interest which he establishes at the trial is different in quantity from that which he claimed in the declaration. If he declares for a specified, undivided interest, he may recover though his evidence is for a much smaller interest.<sup>2</sup> The same rule probably prevails where plaintiff declares for the whole; in which case, he may recover either the whole or any undivided moiety thereof, as he shall show himself entitled.<sup>3</sup> From this last proposition the Courts of Maryland, as well as some of the early decisions in New York, dissent. They hold that plaintiff “cannot recover an *undivided* part when he claims an *entirety*, nor an *entirety* when he demands an undivided portion.”<sup>4</sup>

§ 295. **Forcible Entry and Unlawful Detainer.**—It is said that a cotenant is liable in England to a criminal prosecution for forcibly ejecting or forcibly holding his companion out of possession. The Supreme Court of Illinois, at an early day, maintained that the object of the Forcible Entry and Detainer Act of that State was to create a civil remedy in all cases which, in England, would have sustained a criminal prosecution; and, therefore, that redress might be had in Illinois, under the act of that State, by one tenant in common, or joint-tenant, against his cotenant, where the latter forcibly ousted the former.<sup>5</sup> A like conclusion had been reached a few years previously in the Court of Appeals of the State of Ken-

<sup>1</sup> Mahoney v. Middleton, 41 Cal. 54.

<sup>2</sup> Davis v. Whiteside, 1 Bibb, 510; Burges v. Purvis, 1 Burr, 826; Ablett v. Skinner, 1 Siderf. 229.

<sup>3</sup> Lewis v. McFarland, 9 Cranch, 151; Gist v. Robinet, 8 Bibb, 2; Gray v. Givens, 26 Mo. 303.

<sup>4</sup> Carroll v. Norwood, 5 H. & J. 174; Benson v. Musseter, 7 H. & J. 212. See also, to the same effect, Holmes v. Seely, 17 Wend. 75; Gillett v. Stanley, 1 Hill, 129. But these New York cases are denied in Vrooman v. Weed, 2 Barb. 390; Van Rensselaer v. Jones, 2 Barb. 643; Neilson v. Neilson, 5 Barb. 573.

<sup>5</sup> Mason v. Finch, 1 Scam. 495.

tucky.<sup>1</sup> The judgment in such cases, like that in ejectment, "should be according to the right established *for an undivided interest*;" i. e., it should authorize the putting of plaintiff into possession, but not the putting of defendant out of possession.<sup>2</sup> If a lessee is also a cotenant at the termination of his lease, and, on that account, is entitled to remain in possession, he cannot be proceeded against under the act in reference to unlawful detainers, and thereby compelled to surrender the entire possession.<sup>3</sup> Acts giving double rent against a tenant holding over, after notice to quit, have been held to apply to a cotenant who, subsequent to the expiration of a lease from his companion, refused to let the latter into possession.<sup>4</sup> But the cotenant continuing in sole possession after the termination of the lease from his companion, is not liable for rents, unless he does some act to prevent the latter from joining in the occupation.<sup>5</sup> But where one obtains possession under a lease from the other, he must, at the termination of the lease, surrender the possession which he acquired by it. If an action for an unlawful detainer is brought against him, he cannot successfully resist it by showing that the title was at the leasing, and still is vested in himself and his lessor as tenants in common.<sup>6</sup>

§ 296. **Trespass to try titles, like an action of ejectment, cannot be sustained by one tenant in common, or other cotenant, against one of his fellow-tenants, in the absence of an actual ouster.**<sup>7</sup>

#### FOR ACTS OF TRESPASS.

§ 297. **An action on the case has long been recognized as an available remedy for many of the wrongs suffered by one cotenant from the hands of another. Thus, Lord Coke states that, "if two several owners of houses have a river in**

<sup>1</sup> *Eads v. Bucker*, 2 Dana, 111. The same rule prevails in Massachusetts. *Presbrey v. Presbrey*, 13 Allen, 281. Also in California. *Bowers v. Cherokee Bob*, 45 Cal. 495.

<sup>2</sup> Same as 1; and *Jamison v. Graham*, 57 Ill. 97.

<sup>3</sup> *Henderson v. Allen*, 23 Cal. 519; *Lick v. O'Donnell*, 3 Cal. 59.

<sup>4</sup> *Cutting v. Derby*, 2 H. Bla. 1075, 1077; *Mumford v. Brown*, 1 Wend. 52.

<sup>5</sup> *Mumford v. Brown*, 1 Wend. 52.

<sup>6</sup> *Hershey v. Clark*, 27 Ark. 528.

<sup>7</sup> *Taylor v. Stockdale*, 3 McCord, 302; *Harvin v. Hodge*, Dudley, 23.

common between them, if one corrupt the river, the other shall have an action upon his case;"<sup>1</sup> and Lord Kenyon declares that "if one tenant in common misuse that which he has in common with another, he is answerable to the other in an action for misfeasance."<sup>2</sup> An action on the case is the proper means of redress for a tenant in common who has been injured by the "disturbance or deprivation of the enjoyment of an incorporeal hereditament."<sup>3</sup> "It may be safely laid down as a principle governing actions between tenants in common, that when there is a total destruction of the article held in common, an action of trover or trespass may be sustained; but where there has been simply an abuse of it, whereby its value is impaired, an action on the case may be brought."<sup>4</sup> It is therefore maintainable for a disturbance of a common of pasture,<sup>5</sup> or for the disturbance of a ferry by setting up another ferry near it.<sup>6</sup> If two persons have the right to fish upon the lands of another, this is an incorporeal hereditament. If one of these persons keeps the other out of the enjoyment of this right he is liable, in an action on the case, for the damages occasioned to his cotenant by such deprivation.<sup>7</sup> "In England, one commoner maintains an action on the case against another commoner for surcharging the common, whereby the plaintiff is unable to enjoy the common in so ample and beneficial a manner as he ought and otherwise would."<sup>8</sup> "In cases where there has not been a total destruction of the subject-matter of the tenancy in common, but only a partial injury to it, waste, or an action on the case will lie by one tenant in common against another; as if one tenant in common of a wood or piscary does waste against the will of another, he shall have waste; or if one corrupts the water, the other shall have an action on the case."<sup>9</sup> This action is

<sup>1</sup> Co. Litt. 200 b.

<sup>2</sup> *Martyn v. Knowllys*, 8 T. R. 146; *Booth v. Sherwood*, 12 Minn. 429.

<sup>3</sup> *Duncan v. Sylvester*, 24 Me. 488; *Stocks v. Booth*, 1 T. R. 428; *Beach v. Child*, 13 Wend. 343.

<sup>4</sup> *Bond v. Hilton*, Busb. Law, 309.

<sup>5</sup> *Atkinson v. Teasdale*, 3 Wils. 278.

<sup>6</sup> *Blissett v. Hart*, Wiles, 508.

<sup>7</sup> *Duncan v. Sylvester*, 24 Me. 482.

<sup>8</sup> *McLellan v. Jenness*, 43 Vt. 190; *Hobson v. Todd*, 4 T. R. 73.

<sup>9</sup> *Littledale, J.*, in *Cubitt v. Porter*, 8 Barn. & C. 268.

a proper remedy for an injury to the common property, as by tearing down a dam, taking wheels out of a mill, etc.<sup>1</sup> An action on the case may be sustained by a cotenant against his fellow-tenant for diverting water from a mill which they owned in common,<sup>2</sup> and also for erecting a dam across a stream, whereby the common property was overflowed.<sup>3</sup> The same action has been allowed for obstructing a cotenant from cleaning out a well,<sup>4</sup> and also for a destruction by one part owner of the title deeds of the joint estate,<sup>5</sup> and also for the negligence of a tenant in common, through which a mill belonging to the cotenants was destroyed by fire.<sup>6</sup> In North Carolina, it has been held that "if a tenant in common receives more than his share of the profits, *by an excessive use of the property*, as by wearing out the land, or by an *improper use of it*, as by cutting down the timber and selling it, he cannot be treated as a tortfeasor, but the remedy of the cotenant is by an action of account, or a bill in equity for an account."<sup>7</sup>

§ 298. **Trespass.**—There was never any doubt that if either cotenant destroyed the property of the cotenancy, the other might have an action of trespass, and this was supposed to be because, after such destruction, there was no cotenancy to be pleaded in bar.<sup>8</sup> But in some of the authorities, no other exception seems to be recognized; and in a few, the unqualified statement is made that "trespass lies not by one tenant in common against another tenant in common."<sup>9</sup> This statement, whenever and wherever made, must be understood as being applicable only to the particular facts before the Court; for it is not probable, nor even possible, that any Judge, whose official position was such as to make his opinions

<sup>1</sup> Linton v. Wilson, 1 Kerr, (New Brunswick,) 231.

<sup>2</sup> Blanchard v. Baker, 8 Greenl. 253; Pillsbury v. Moore, 44 Me. 154; McLellan v. Jenness, 43 Vt. 186; Runnels v. Bullen, 2 N. H. 536

<sup>3</sup> Odiorne v. Lyford, 9 N. H. 502.

<sup>4</sup> Newton v. Newton, 17 Pick. 207.

<sup>5</sup> Daniels v. Daniels, 7 Mass. 135.

<sup>6</sup> Chelsey v. Thompson, 3 N. H. 1.

<sup>7</sup> Darden v. Cowper, 7 Jones Law, 210; Smith v. Sharp, Busb. Law, 91.

<sup>8</sup> Co. Litt. 200 b.

<sup>9</sup> Matt v. Hawkins, 5 Taunt. 22; McPherson v. Seguire, 5 Dev. 154; Noye v. Reed, 1 Man. & Ry. 63.



thought worthy of being printed in the reports, ever intended to assert that, under no circumstances, can one cotenant sustain an action of trespass against another. The action of trespass, as a remedy between cotenants, is clearly sustainable in two contingencies, and in but two. The first is where there has been something which the Court feels authorized by the rules of law to treat as an ouster; the second is where there has been some act which the Court is authorized to treat as a destruction of the common property. Courts have differed, and beyond doubt always will differ, as to whether a particular state of facts amounts to either an ouster from, or a destruction of, the subject of the tenancy. Except in such diversity of opinion as has arisen from this difference, the rules of law governing the action of trespass as a remedy for the wrongs suffered by one cotenant at the hands of his fellow, seem to be entirely harmonious.

§ 299. Until the destruction of the subject of the tenancy, or at least until the happening of something which, in its effect on the rights of the injured party, is equivalent to such destruction, he cannot sustain any action in trespass against his cotenant, unless the latter has ousted him.<sup>1</sup> Each cotenant has the right to enter upon the lands of the cotenancy. His entry cannot, therefore, of itself, support an action of trespass.<sup>2</sup> The entry being lawful, trespass will not lie for a subsequent act not amounting to an exclusion of the other part owner, nor to a destruction of the property.<sup>3</sup> Cutting and removing timber and grass, at least if done in the ordinary course of taking the profits of the land, do not entitle the cotenant not participating in such cutting and removing to an action in trespass; "for if such an action could be maintained, the result would be that if two persons were tenants in common of two fields, and each took the

<sup>1</sup> *Harman v. Gartman*, Harper, 430; *Jones v. Chiles*, 8 Dana, 163; *Bishop v. Blair*, 36 Ala. 85; *Filbert v. Hoff*, 42 Pa. St. 97; *Trauger v. Sassaman*, 14 Pa. St. 517; *McGill v. Ash*, 7 Pa. St. 397; *Cubitt v. Porter*, 8 Barn. & C. 257; 15 East, 216; *Jacobs v. Seward*, L. R. 5 H. L. 472; *Mumford v. Brown*, 1 Wend. 52; *King v. Phillips*, 1 Lans, 435.

<sup>2</sup> *Wright v. Chandler*, 4 Bibb, 422; *Booth v. Adams*, 11 Vt. 160; *Kenniston v. Leighton*, 43 N. H. 312.

<sup>3</sup> *Cubitt v. Porter*, 8 Barn. & C. 257.



whole profits of one, they would each have a right of action against the other for trespass in taking the whole profits of one field. It is laid down, sometimes on the ground of public policy, and sometimes as *ex necessitate rei*, that the only remedy of a tenant in common who has not had his share of the profits of the common property, is by an action of account."<sup>1</sup> The Courts of Vermont have gone so far as to declare that where two were tenants in common of a lot, and one of them entered "and cut and carried away the timber from all of said lot," he was not liable in trespass therefor.<sup>2</sup> This case differs from all others coming under our observation, in this, that *all* the timber seems to have been removed. But as the general principle has been thoroughly established, that, in the absence of the destruction of the subject of the tenancy, no action of trespass can be sustained against a cotenant unless based upon an *ouster*, we see no reason for questioning the soundness of the Vermont decision, unless the facts before the Court showed such a *destruction*; for the removing of *all* the timber is no more an ouster than is the removal of a part. But there may be instances in which the removal of *all* the timber on a tract of land is equivalent to a *destruction* of the subject of the cotenancy. Such would be the case if the sole or the chief value of the property consisted in the timber; and perhaps taking an amount of timber in excess of the ordinary *profits* of the estate would be a *destruction pro tanto*. But we will postpone the consideration of what injuries may be redressed by an action of trespass on the ground that they are equivalent to a destruction, until we reach a subsequent section of this chapter.

§ 300. **Trespass for Ouster.**—On the other hand, if the ouster of the plaintiff by the defendant be conceded, the fact of their cotenancy is no defense to an action of trespass.<sup>3</sup> "If one tenant in common enter upon his cotenant and oust him of his premises, trespass *quare clausum fregit* lies for the

<sup>1</sup> Willes, J., in *Jacobs v. Seward*, L. R. 4 C. P. 329; affirmed, L. R. 5 H. L. 472; *Van Orman v. Phelps*, 9 Barb. 500; *King v. Phillips*, 1 Lans. 434.

<sup>2</sup> *Wait v. Richardson*, 33 Vt. 190.

<sup>3</sup> *Erwin v. Olmstead*, 7 Cow. 230; *Murray v. Hall*, 62 E. C. L. 439; 7 C. B. 441; *Sil-loway v. Brown*, 12 Allen, 37.

injury.”<sup>1</sup> In the case of *Wait v. Richardson*, cited in the preceding section, it did not appear that the defendant had ousted plaintiff from any part of the premises. On the contrary, as stated in the opinion of the Court, “the plaintiff herself was all the while in possession of the property, claiming to hold it adversely to the defendant, in exclusive ownership.” Therefore, it was not possible that the effect of an ouster could, in that case, become a material subject of inquiry, demanding the consideration of the Court. Nevertheless, after considering and disposing of all the matters which were necessary to be considered, the Court proceeded further, and said: “The manner in which the subject of trespass to real property is presented in Hammond’s N. P. 151, (a book remarkable for philosophical and logical method in propounding and developing legal principles,) makes palpable the paradox involved in the idea of the right of a tenant in common to maintain trespass *qu. cl.* against his cotenant. ‘In every case where one man has a right to exclude another from his real immovable property, the law encircles his estate, if it be not already enclosed, with an imaginary fence, etc., and entitles him to a compensation in damages for the injury he sustains by the act of another passing through the boundary, denominating the injurious act a breach of the enclosure.’ It is fundamental in the law of the subject that one tenant in common has no right to exclude the other from the common property. Hence, any enclosure of it, whether by the imaginary fence which the law constructs, or by a real one constructed by the hands of men, defines no right in exclusion of, and constitutes no barrier against, either of the common tenants; and of course the passing through such boundary by either of them would be no breach of the enclosure, and could give no right of action in trespass *quare clausum fregit*.”<sup>2</sup> No doubt, there are some other cases in harmony with the one just alluded to, in so far as it denies that trespass *qu. cl.* can ever be sustained by one cotenant against another.<sup>3</sup> These

<sup>1</sup> *Dubois v. Beaver*, 25 N. Y. 128; *Bennett v. Clemence*, 6 Allen, 18; *Filbert v. Hoff*, 42 Pa. St. 97; *McGill v. Ash*, 7 Barr, 897; *Odiorne v. Lyford*, 9 N. H. 511; *Badger v. Holmes*, 6 Gray, 118.

<sup>2</sup> *Wait v. Richardson*, 33 Vt. 194.

<sup>3</sup> See *Cubitt v. Porter*, 8 Barn. & C. 269, which as to this point is overruled by *Murray v. Hall*, 7 O. B. 454; 13 Jur. 262; 18 L. J. C. P. 161.

cases rest upon the assumption that an unlawful entry is an indispensable prerequisite to an action of trespass *quare clausum fregit*. This position seems to have been overthrown and abandoned in England a quarter of a century ago.<sup>1</sup> The argument adduced by the Supreme Court in Vermont, that the law surrounds every one's lands with an imaginary barrier, and that no action can be sustained against any cotenant for entering such barrier because, as against his entry, it does not exist, by no means "makes palpable the paradox involved in the idea of the right of one tenant in common to maintain trespass *qu. cl.* against his cotenant." This barrier, whether imaginary or real, has a twofold purpose. It is a defense from without and from within. If it secures the owner against *invasion* from those who have no legal right to enter, it likewise protects him from *expulsion* by those who, though entitled to enter, are not authorized to expel. Trespass, *quare clausum fregit*, if we may rely upon the ordinary signification of those words, is a remedy for a wrong done in *breaking* this barrier. Is not the barrier as much broken, in law and in fact, by unlawfully thrusting a man out of it, as by unlawfully thrusting a man into it?

§ 301. **What is an Ouster?**—As a very decided preponderance of the authorities shows that a cotenant may sustain an action of trespass against his fellow-tenant, to recover the damages occasioned by an ouster, we are now naturally led to the inquiry, what is an ouster, within the meaning of the authorities on this subject? In response to this inquiry, we think the answer of the authorities would be that in these cases the word ouster has its ordinary signification, viz., "an actual turning out or keeping excluded the party entitled to the possession of any real property corporeal."<sup>2</sup> It does not arise from a mere denial of the plaintiff's title.<sup>3</sup> But any resistance preventing plaintiff from obtaining effective possession of the land of the cotenancy is an actual ouster.<sup>4</sup> Such

<sup>1</sup> *Murray v. Hall*, 7 Com. B. 454; 13 Jur. 262; 18 L. J. C. P. 161.

<sup>2</sup> *Bour. Law Dic.*, title "Ouster."

<sup>3</sup> *Filbert v. Hoff*, 42 Pa. St. 99.

<sup>4</sup> *Silloway v. Brown*, 12 Allen, 38; *Doe v. Prosser*, Cowp. 218; *Marcy v. Marcy*, 6 Met 371; *Gordon v. Pearson*, 1 Mass. 323.

resistance must, however, be clearly and affirmatively shown; and is not presumed from equivocal facts which may or may not have been designed to operate as an exclusion. Hence, a finding that the gate of the premises was kept locked does not establish an ouster, because it does not show that plaintiff was excluded by the locking, or that, at some time, he applied to have it unlocked and was refused.<sup>1</sup> An exclusive appropriation of the land to his own use, by erecting a permanent structure thereon, would be evidence of an ouster of his cotenant.<sup>2</sup> But each cotenant has the right to place a structure on the land, if of a temporary nature and for a temporary purpose. In so doing, he does not indicate any design to make any permanent appropriation, and therefore is not guilty of any ouster.<sup>3</sup> In some instances, an act has been denominated an ouster, although nobody was removed from nor kept out of the lands owned in common. 'Thus, in a case which arose and was determined in the State of South Carolina, the evidence proved that the defendant had entered upon lands of which he was a part owner, and when the season was too far advanced to commence a new crop, had ploughed up the corn." Upon this state of facts, Gantt, Justice, delivering the opinion of the Court, said: "I can conceive of no *disseizin* more absolute than that which took place on this occasion. The plaintiff was in peaceable possession of the tenement, by an express contract of lease with one of the tenants in common, and by as clear and indubitable implied assent on the part of the other, who, although immediately in the neighborhood, did not interpose his equal right in opposition to the act of the other, but suffered the plaintiff to repair fences, plough, and plant the corn, and after it was half made, went with high hand and forcibly destroyed the crop of the tenant. If this did not constitute *ouster* or *disseizin*, then they are terms without meaning. It would be an abuse of language, and a waste of time, to reason on the subject, for the purpose of showing that here was a *disseizin* committed."<sup>4</sup> Language of similar import has also been employed by Judges of great

<sup>1</sup> *Jacobs v. Seward*, L. R. 5 H. L. 472.

<sup>2</sup> *Bennett v. Clemence*, 6 Allen, 18.

<sup>3</sup> *Keay v. Goodwin*, 16 Mass. 1; *Bennett v. Clemence*, 6 Allen, 18.

<sup>4</sup> *Harman v. Gartman*, Harper, 430.

eminence in England. An action of trespass was decided in the Court of Queen's Bench, in which Lord Denman and the other Judges concurred in holding defendant liable to his cotenant for taking and carrying away turf; and his Lordship considered "this an ouster affected by means of the destruction of the property," because "the turf does not so grow as to become part of the accruing profits which are the subject of enjoyment by the tenants in common."<sup>1</sup> These cases were, beyond all question, determined in accordance with the authorities then and now existing; but they use the term *ouster* in a sense which includes the idea of destruction. This use, if permissible, is at least unusual, and is liable to lead the reader into the error of supposing that an act which could not be regarded as an ouster of a tenant in severalty, is sufficient to constitute an ouster of a tenant in common.

§ 302. **What is a Destruction?**—The two cases last referred to, in the preceding section, show that trespass may be sustained by any cotenant against his fellow-tenant, for *destroying* the common estate. In this respect, these cases are unquestionable. The destruction here spoken of may be an annihilation of the whole or of some part of the subject of the tenancy, or it may destroy the *rights* of some of the cotenants while the subject remains *in esse*. In all cases where a cotenant practically destroys the estate, or some part thereof, trespass may be sustained by the injured cotenant.<sup>2</sup> It is therefore an appropriate remedy for the demolition or removal of a mill, and its appropriation to the use of one of the cotenants;<sup>3</sup> and also for the diversion of water from a mill owned in common to a mill owned in severalty by one of the cotenants.<sup>4</sup>

§ 303. **That an action of trespass for mesne profits may be maintained by one cotenant against another after and as a necessary consequence of a judgment in ejectment, has long been established both in England<sup>5</sup> and in Amer-**

<sup>1</sup> *Wilkinson v. Haggarth*, 12 Q. B. 845; 11 Jur. 104; 16 L. J. Q. B. 103.

<sup>2</sup> *Symonds v. Harris*, 51 Me. 19.

<sup>3</sup> *McDonald v. Trafton*, 15 Me. 225.

<sup>4</sup> *Blanchard v. Baker*, 8 Me. 253.

<sup>5</sup> *Goodtitle v. Tombs*, 3 Wils. 121.

ica.<sup>1</sup> The judgment in ejectment necessarily establishes the ouster of the plaintiff. The allowance, after ejectment, of the action of trespass for mesne profits, therefore forms no exception to the rule that trespass between cotenants must be supported by an *ouster* or a *destruction*. The defendant may defalk the value of improvements made on the land against the claim for mesne profits.<sup>2</sup>

§ 304. The lessee of a cotenant is not liable in an action of trespass against him by another cotenant, for any act done by him by virtue of his lease or by leave of his lessor, unless the latter would also have been liable had he done the same act.<sup>3</sup>

§ 305. The statute of Westminster, 2, c. 22, "enacts that if there be two tenants in common of a wood, turbary, piscary, etc., and do waste, the other shall have a writ of waste, and the waster shall have election before judgment, either to have his part in certain assigned to him by the oath of twelve men, (and then the place wasted shall be assigned for part thereof,) or to grant that he will take no more for the future than his companion shall approve of; and this act, by construction, has been held to extend to joint-tenants, but not to parceners, because they have the writ *de partitione faciendâ* at common law.<sup>4</sup> In some parts of the United States, this statute is regarded as in force, and as rendering each cotenant liable for waste.<sup>5</sup>

#### FOR CONVERSION.

§ 306. **Trover.**—Neither a joint-tenant, tenant in common, nor coparcener, can maintain an action of trover against a cotenant, unless the latter has made some disposition of the property entirely inconsistent with the rights of his cotenants.

<sup>1</sup> *Hare v. Fury*, 3 Yeates, 18; *Bennett v. Bullock*, 35 Pa. St. 367; *Chambers v. Chambers*, 3 Hawks, 232; *Carpentier v. Mitchell*, 29 Cal. 333; *Langendyck v. Burhams*, 11 Johns. 461; *Camp v. Homesley*, 11 Ired. 212; *Izard v. Bodine*, 3 Stock. 403.

<sup>2</sup> *Walker v. Humbert*, 55 Pa. St. 403.

<sup>3</sup> *Ord v. Chester*, 18 Cal. 79.

<sup>4</sup> 5 Bac. Ab. 306,

<sup>5</sup> *Shiels v. Stark*, 14 Geo. 436; *Nelson's Heirs v. Clay's*, 7 J. J. M. 140. A cotenant taking away the wheels of a mill is, in New Brunswick, liable to his cotenants for waste. *Linton v. Wilson*, 1 Kerr, 223.

Until these rights are ignored, no conversion occurs. The right of each cotenant to continue in exclusive possession of the property being universally acknowledged, it follows that no conversion can arise from the fact of such exclusive possession, and no action of trover can be sustained by reason thereof.<sup>1</sup> The plaintiff, to entitle himself to judgment, must prove that the property has been sold, destroyed, or otherwise disposed of by the defendant.<sup>2</sup> It makes no difference that the subject of the tenancy consists of crops in the possession of defendant, and he, after demand, refuses to deliver any part to the plaintiff.<sup>3</sup> Under the common law, there must be a destruction of the chattel or something equivalent to it—something which, “as it were, amounts to an ouster, so that a tenant in common who commits it cannot account.”<sup>4</sup>

§ 307. **Trover when Sustainable.**—But if the facts brought to the attention of the Court show such an act or acts in reference to the common property as to induce the conclusion that the defendant has disregarded the rights of his cotenant by a destruction of the property or by an appropriation of it to his own use, then a conversion is established, for which an action of trover is an appropriate means of redress.<sup>5</sup> The facts from which such destruction or appropriation may be presumed must be inconsistent with the obligations of the cotenancy, otherwise no conversion is shown. The facts which are thus inconsistent, and are therefore sufficient to establish a conversion and to support an action of trover, by the injured cotenant against his companion, cannot be exactly specified, because upon this, as upon most other questions involving the exercise of human judgment, the conclusions attained have not been entirely harmonious. We shall now undertake to state and classify the different decisions which have come within our observation, and which furnish

<sup>1</sup> *Cowan v. Buyers*, Cooke's Tenn. R. 58; *Webb v. Danforth*, 1 Day, 311; *Roody v. Cox*, 29 Geo. 309; *Hurd v. Darling*, 14 Vt. 214; *Brown v. Hedges*, 1 Salk. 290; *Brady v. Arnold*, 19 C. P. (Upper Canada) 47; *Smith v. Stokes*, 1 East, 363; *Tyler v. Taylor*, 8 Barb. 585; *Shamburg v. Moorehead*, 4 Brewster, 92.

<sup>2</sup> *Williams v. Nolen*, 34 Ala. 169; *Perminster v. Kelly*, 18 Ala. 716.

<sup>3</sup> *Ballou v. Hale*, 47 N. H. 347.

<sup>4</sup> *Chambre, J.*, in *Fennings v. Lord Grenville*, 1 Taunt. 248.

<sup>5</sup> *Bell v. Layman*, 1 Mon. 40.



all the answers which can be authoritatively given to the question, What acts of a cotenant amount to a conversion by him of the subject of the tenancy?

§ 308. **Whether the sale of a chattel by a cotenant thereof, representing himself to be the sole owner and professing to transfer the whole title thereto, is such a conversion as empowers the other cotenant to maintain an action in trover against the seller, is a question which has arisen with great frequency, and has drawn forth very irreconcilable replies. In the United States, the answers have been in the affirmative in a decided majority of the cases.<sup>1</sup> “He who sells his cotenant’s share of the property to a stranger who will hold against him has violated the relation he bore, and injured his companion as much, perhaps, as if he had destroyed the property. Why, then, should he not have a legal remedy against the wrongdoer, instead of requiring him to look to the purchaser for his interest in the property, and he to the wrongdoer?”<sup>2</sup> So it is said the sale “of a chattel by a cotenant shows a kind of dominion unjustifiable and inconsistent with the rights of the parties.”<sup>3</sup> But the rule that a cotenant selling the whole of a chattel as his own and delivering possession thereof to the purchaser, is responsible to his cotenant in an action of trover, is not enforced merely because it affords a penalty against him for violating the obligations of the joint ownership. It depends upon principles which are equally applicable to ownership in common and to ownership in severalty. Whoever assumes the rights of ownership and the power of disposition over personal property, and carries this assumed authority so far as to dispose of the thing as his own, thereby *converts* it, and makes himself liable to an action of trover. If, instead of assuming authority over the whole, he assumes it over a part, then the conversion exists as to that**

<sup>1</sup> *Dyckman v. Valiente*, 42 N. Y. 560; *Arthur v. Gayle*, 38 Ala. 264; *Cowles v. Garrett’s Admr.* 30 Ib. 350; *Dain v. Cowing*, 22 Me. 349; *White v. Osborn*, 21 Wend. 76; *Wilson v. Reed*, 3 Johns. R. 178; *Carr v. Dodge*, 40 N. H. 408; *Mumford v. McKay*, 8 Wend. 444; *Yamhill Bridge Co. v. Newby*, 1 Oregon, 173; *Cowan v. Buyers, Cooke*, 58; *White v. Brooks*, 43 N. H. 407; *Williams v. Chadbourne*, 6 Cal. 561; *Neilson v. Slade*, Ala., Jan. 1873.

<sup>2</sup> *Permitter v. Kelly*, 18 Ala. 718.

<sup>3</sup> *Carr v. Dodge*, 40 N. H. 408.



part only. It is none the less a conversion of the *part* because he who converts may be the owner of another part or interest; and the law does not withhold its remedy merely because the conversion is of an undivided interest instead of an entirety.<sup>1</sup> In some of the cases, the rule by which a sale of the entire subject of the tenancy is declared a conversion is justified upon the ground that such sale is a kind of destruction of the rights of the other cotenant. But the rule does not rest on this ground. If it did so rest, it must necessarily fall for want of sufficient support. A sale by one cotenant cannot of itself affect the title of the other. It neither destroys the latter's property nor any of his rights arising out of such property. It is a conversion, not because of the destruction but of the appropriation of the property of another.

§ 309. **Trover for Sale of Chattels denied.**—The general purport of the majority of the American decisions upon the subject now under consideration was stated in the preceding section. Vermont and North Carolina are probably the only States which continue to breast the current of authority,<sup>2</sup> although there are some early decisions in Connecticut<sup>3</sup> which may possibly have been intended to commit that State to the same course. In England, the authorities seem to be more evenly divided than in the United States, but the preponderance is against the rule as generally recognized in this country, and in favor of the proposition that the mere sale of a chattel by one part owner is not a conversion as against the other. Bayley, J., in *Barton v. Williams*,<sup>4</sup> said: "There may be cases in which the indivisible nature of the subject-matter of the tenancy in common may raise an implied authority in one to sell the whole. But unless there be such authority, either express or implied, a sale of the whole by one tenant in common is, with respect to the other, a wrongful conversion

<sup>1</sup> *Wheeler v. Whaler*, 33 Me. 349; *Weld v. Oliver*, 21 Pick. 563; *Hyde v. Stone*, 9 Cow. 230; *Rains v. McNalty*, 4 Humph. 358; *Lowe v. Miller*, 3 Gratt. 213; *Delaney v. Root*, 99 Mass. 547.

<sup>2</sup> *Barton v. Burton*, 27 Vt. 95; *Sanborn v. Merrill*, 15 Ib. 700; *Welch v. Clark*, 12 Ib. 681; *Tubbs v. Richardson*, 6 Ib. 442; *Pitt v. Petway*, 12 Ired. 73.

<sup>3</sup> *Oviatt v. Sage*, 7 Conn. 95; *Webb v. Danforth*, 1 Day, 301. See also *St. John v. Standing*, 2 Johns. 468, decided at an early day in New York.

<sup>4</sup> 5 Bar. & Ald. 403.

ided part." But this language is a mere dictum, probably because it was a dictum, was neither approved nor disapproved by the other three Judges who wrote opinions in the case. But there are some other cases which seem to sustain this dictum.<sup>1</sup> On the other hand, in a later case, *Marke, B.*, states that until a doubt was raised in *Barton v. Williams*, he always understood that one joint-tenant or tenant in common of a chattel could not be guilty of a conversion by a sale of that chattel, unless by such sale the interest of the other cotenant was transferred to the purchaser as in case of a sale in market overt.<sup>2</sup> So there may be other sales which amount to a conversion, as where the subject of the tenancy is sold in different parcels and delivered to a number of purchasers who carry it away.<sup>3</sup> But unless the sale, from being in market overt, invests the purchaser with a complete title in severalty; or unless from the fact that, through the sale, the property has been carried away, or so changed as to amount to a practical destruction of the rights of the cotenant who did not join in the sale, he cannot, according to the weight of the English authorities, sustain an action of trover against the cotenant making the sale.<sup>4</sup> The rule sustained by the majority of the English adjudications on this subject has been adopted and approved in Canada; and the limitations within which the rule must be confined have been stated with greater clearness in that country than in England. Gwynne, J., in delivering the opinion of the Upper Canada Court of Common Pleas, approves and thus summarizes the law as he understands it from the case of *Mayhew v. Herrick*, decided in England: "It seems to be established by that case that if the sale be in market overt, so as to change the property; or if the subject of the joint ownership is sold to a number of purchasers, who carry away the articles; or if the consequences attending the sale are such as to put it out of the power of the plaintiff to take the property, or to pursue his

<sup>1</sup> *Stancliffe v. Hardwick*, 2 C. M. & R. 1; *Higgins v. Thomas*, 8 Q. B. 908.

<sup>2</sup> *Farrar v. Beswick*, 1 M. & W. 687.

<sup>3</sup> *Mayhew v. Herrick*, 7 C. B. 248.

<sup>4</sup> *Mayhew v. Herrick*, 7 C. B. 229; 13 Jur. 1078; 18 L. J. C. P. 179; *Fennings v. Grenville*, 1 Taunt. 241; *Morgan v. Marquis*, 9 Exch. 145.

remedy against the parties who have got possession of it—the case is different, and trover will lie.”<sup>1</sup> In the same Province, but by a different Court, the English rule was examined and approved; but adjudged not to deny the action of trover where defendant had sold grain and other produce of a farm, which could not be reclaimed, and he had, after receiving the whole proceeds, threatened to go away with the money.<sup>2</sup>

§ 310. **Sale of Entirety by Officer.**—A sheriff or other duly authorized officer may levy on the interest of a part owner. To make his levy effectual, he may take possession of the chattel—may retain such possession until the sale, and may deliver it to the purchaser. But he has no authority to sell the interest of any cotenant, other than the one named in his process. If he assume to sell the whole chattel, he cannot transfer the interests of all the cotenants. But in so doing, he nevertheless abuses his legal authority, and renders himself a trespasser *ab initio*. His act is a *conversion* of the interests against which he had no authority to proceed. He is therefore liable to an action of trover.<sup>3</sup>

§ 311. **Vendee of Cotenant.**—The purchaser at a sale made by a part owner, assuming to own and sell the whole, obtains no better or greater title or interest than the vendor had, except the sale be made in market overt.<sup>4</sup> The vendee is therefore entitled to the rights and subject to the obligations of tenancy in common. Hence, he is not liable to an action of trover for continuing in sole possession of the chattel, though he does so under claim of ownership in severalty.<sup>5</sup> But if he sell the chattel, claiming to dispose of the whole thereof, this is a conversion. Each successive sale of the whole chattel is a conversion as against the original cotenant who did not unite

<sup>1</sup> Brady v. Arnold, 19 C. P., Upper Canada, 46.

<sup>2</sup> Rathwell v. Rathwell, 26 Q. B., Upper Canada, 183.

<sup>3</sup> Smyth v. Tankersly, 20 Ala. 212; Rains v. McNairy, 4 Humph. 358; Sheppard v. Shelton, 84 Ala. 652; Melville v. Brown, 15 Mass. 82; Waddell v. Cook, 2 Hill, 48, overruling Mersereau v. Norton, 15 Johns. 179; Ladd v. Hill, 4 Vt. 171. *Contra*—Pitt v. Petway, 12 Ired. 73; Welch v. Clark, 12 Vt. 681.

<sup>4</sup> Ruckman v. Decker, 8 O. E. Green, 283; 12 Am. Law Reg. 468.

<sup>5</sup> Dain v. Cowing, 22 Me. 348; Kilgore v. Wood, 56 Me. 155; Trammell v. McDade, 29 Tex. 360.

in the first sale, "so that trover may be maintained against each until satisfaction is obtained from one."<sup>1</sup>

§ 312. **Trover for Destruction.**—Whenever one joint-tenant, tenant in common, or coparcener, destroys the subject-matter of the tenancy, no doubt this destruction is a conversion for which redress may be sought and obtained in an action of trover.<sup>2</sup>

§ 313. **For Destruction of Rights.**—There may be such an invasion of the rights of one cotenant by another, or such an appropriation of the joint property of the cotenancy by one of its members, that the rights of one of the part owners are in effect destroyed or set at naught, although the property out of which those rights arose may still continue in existence. In such cases, where the effect of the act of one cotenant is practically a destruction of the rights of the other, the latter may resort to an action of trover with the same success as though his property had been annihilated.<sup>3</sup>

§ 314. **Destruction by Emancipating Slave.**—One of the most striking illustrations of a destruction of the rights of a cotenancy without any physical change in its subject-matter, occurs when a slave belonging to two or more is emancipated by the act of one. The emancipation operates on the interest of the emancipator; but as a man cannot be part free and part slave, the act of one owner transforms the former slave into a freeman. The subject of the tenancy is neither annihilated nor removed, in the physical sense, but all legal rights in it are annihilated. He whose rights of property are thus destroyed may treat this destruction as a conversion, and recover the value of his interest by an action of trover against the emancipator.<sup>4</sup>

<sup>1</sup> *Dain v. Cowing*, 22 Me. 348; *Weld v. Oliver*, 21 Pick. 564; *Dyckman v. Valiente*, 42 N. Y. 560; *Kilgore v. Wood*, 56 Me. 155.

<sup>2</sup> *Lowe v. Miller*, 3 Gratt. 213; *Allen v. Harper*, 26 Ala. 690; Co. Litt. 200 a, 200 b; *Pitt v. Petway*, 12 Ired. 73; *Winner v. Penniman*, 35 Md. 165; *Barnardiston v. Chapman*, 4 East, 121; *Knight v. Coates*, 1 Ir. Law R. 57.

<sup>3</sup> *Delaney v. Root*, 99 Mass. 547. An employment of a chattel—as, for instance, a scine—so as to render it useless by use, is a destruction. *Guyther v. Pettijohn*, 6 Ired. 388.

<sup>4</sup> *Oatfield v. Waring*, 14 Johns. 192; *Nunnally v. White's Executors*, 3 Met., Ky., 584; *Tom Davis v. Tingle*, 8 B. Monr. 544.

§ 315. **By allowing Property to be Lost.**—If a tenant in common of hogs or other live stock turn them into the road or street, and pay no further attention to them, whereby they are lost, this “is at least a *prima facie* evidence of destruction.”<sup>1</sup> If materials be taken by one cotenant thereof and made into a structure which is annexed to, and therefore a part of, his realty, this conversion of the property into real estate entitles the other cotenant to recover his share in trover.<sup>2</sup> If one of two payees of a promissory note deliver it to the maker to be by him cancelled or destroyed, this, “if done without the authority of the other, is as much an assumption of the right of disposing of another’s property as could have resulted from its sale or destruction;” and the injured party may therefore recover the value of his interest in the note.<sup>3</sup>

§ 316. **Mixing and Changing Chattels.**—The taking of a chattel, such as iron, melting it with other iron, and manufacturing the whole into various kinds of wares, so that there can no longer be any tracing or identification of the different parts, is equivalent to a destruction of the chattel so taken.<sup>4</sup> But if two or more are cotenants of a chattel which must go through some change of form, either for its preservation or to render it fit for common and profitable use, either of them may cause this change to be made without being guilty of any conversion of the property. Hence, if two be tenants in common of a whale, one of them may convert it into oil, and the two will thereby become cotenants of the oil. This is regarded not as a destruction but as a preservation of the subject-matter of the cotenancy.<sup>5</sup>

§ 317. **The mere removal of a chattel is, perhaps, never equivalent to a destruction thereof.** Hence, where one of the part owners of a ship took and carried it away by

<sup>1</sup> *Sheldon v. Skinner*, 4 Wend. 530.

<sup>2</sup> *Yamhill Bridge Co. v. Newby*, 1 Oregon, 174.

<sup>3</sup> *Winner v. Penniman*, 35 Md. 166.

<sup>4</sup> *Redington v. Chase*, 44 N. H. 87.

<sup>5</sup> *Fennings v. Lord Grenville*, 1 Taunt. 246. Maintaining possession of logs, and driving them out of a river, to get them in such a condition as to preserve them and prevent their depreciation in value, being an act of preservation, is not a conversion. *Kilgore v. Wood*, 56 Me. 154.

force, it was held that the other part owner could not treat this as a conversion and maintain trover.<sup>1</sup> And the English Courts have gone so far as to decide that even the secret removal of a chattel with intent to sell it and convert the proceeds to his own use, is not a conversion when done by a tenant in common.<sup>2</sup> In this direction, we think the English Courts have gone farther than the American Courts will consent to follow. It is too clear to require either illustration or argument that there may be such a removal of a chattel as results in an entire loss of the interest of some of the part owners. A removal to some place unknown to one of the cotenants, under such circumstances as afford him no means of ascertaining where the chattel can be found, certainly is such a destruction of his interest as entitles him to redress in an action of trover.<sup>3</sup> The general rule in regard to the effect of a removal of a chattel by one of the part owners seems to be this, that while the right to retake the chattel can be successfully asserted by the part owner, he cannot sustain any action; but as soon as this right is extinguished his remedy is complete. Thus, where part of the owners of a ship seized it and took it to foreign parts against the consent of the others, this was not considered as sufficient to subject the seizing part owners to an action; but when the vessel, while so absent, was lost, and its recapture thereby became impossible, the non-consenting owners recovered the value of their shares in trover.<sup>4</sup> As a ship is a chattel designed to be moved from port to port, and can only be profitably employed by being taken or sent to foreign as well as domestic ports, its removal from any place in which it may happen to be, especially if such removal is to devote the ship to any usual employment, cannot be regarded as any greater invasion or destruction of the rights of a part owner than arises from the mere exclusive possession of those chattels which are not intended, in their ordinary use, to be transported from place to place. Therefore, such a reasonable flexibility as commonly obtains in applying general rules of law to diverse circumstances, it

<sup>1</sup> *Barnardiston v. Chapman*, cited in *Heath v. Hubbard*, 4 East, 121.

<sup>2</sup> *Jones v. Brown*, 38 E. L. & E. 304.

<sup>3</sup> *Lucas v. Wasson*, 3 Dev. 898.

<sup>4</sup> *Knight v. Coates*, 1 Ir. L. R. 57.

seems to us, requires that those facts which may not amount to a conversion of the interest of a part owner of a ship, may nevertheless be tantamount to a conversion or legal destruction of a part owner's interest when the subject of the tenancy is some chattel not designed, in its ordinary use, to be removed from one point to another. Hence, where two were tenants in common of a marine railway, consisting of iron and wooden rails and sleepers, endless chain, gear wheels, and ship-cradle, and one of them removed these materials to another town and made them into a new railway on his own land, the other cotenant succeeded in maintaining trover for his proportion.<sup>1</sup> Under like circumstances, a tenant in common of certain personal property, consisting of a shingle-mill, and of a clapboard or siding-mill and a steam-engine used for operating these mills, was allowed to recover in the same form of action.<sup>2</sup>

§ 318. **For refusal to apply Property to its proper use.**—In Pennsylvania, an action of trover was brought to recover damages for the conversion of certain stereotyped plates of a pictorial history. In the final determination of this suit, the Supreme Court used the following language: "The reason why one joint-tenant or tenant in common cannot maintain trover against his companion is, that both are equally entitled to possession, and the possession of one is the possession of both, and is in accordance with the right of both. But where one *misuses* the joint property by appropriating it to uses for which it was not designed, and refuses to apply it to the purposes for which it was held by both, or if one delivers the property wrongfully to a stranger, for purposes inconsistent with the purposes for which it was designed, and such stranger denies the title of the other, and claims the exclusive possession and ownership, the reason of the rule ceases, and trover may be maintained."<sup>3</sup>

§ 319. **Trover for refusing to Sever.**—Where the chattels constituting the subject-matter of a cotenancy are of a severable character, so that either cotenant may lawfully sever

<sup>1</sup> Strickland v. Parker, 54 Me. 264.

<sup>2</sup> Benedict v. Howard, 31 Barb. 571.

<sup>3</sup> Agnew v. Johnson, 17 Penn. St. 377.



and appropriate his share without the consent of the others, the rule that taking, and, after demand, retaining exclusive possession, is not a conversion, no longer prevails. Hence, where two were tenants in common of a number of bushels of grain, and one of them locked it up, and refused to permit a division, or to recognize the rights of the other, this was held sufficient to sustain an action of trover, because neither a loss, sale, nor destruction of the common property could more completely deprive the injured party of his rights, nor "give him any better legal or equitable right to an action against his cotenant."<sup>1</sup> And where the property was, in pursuance of an agreement between the cotenants, to be divided at a particular place, and one of them took it beyond that place to a point from which its return was impracticable, he was held to be liable for its *conversion*.<sup>2</sup>

#### FOR REPAIRS.

§ 320. **Writ to compel Repairs.**—Where the subject of the tenancy was in need of repairs, the common law, in some cases, gave a remedy which compelled the several co-owners to unite in making the necessary reparations. "If two tenants in common, or joint-tenants, be of an house or mill, and it fall in decay, and the one is willing to repaire the same, and the other will not, he that is willing shall have a writ *de reparatione faciendâ*; and the writ saith, *ad reparationem et sustentationem ejus dem domus teneantur*; whereby it appeareth, that owners are in that case bound *pro bono publico* to maintain houses and mills which are for habitation and use of men."<sup>3</sup> But "if there be two joint-tenants of a wood, or arable land, the one has no remedy against the other to make inclosure or reparations for safeguard of the wood, or corn."<sup>4</sup> It seems clear from these two quotations that this writ only issued to compel repairs to a house or a mill. Some doubt has arisen whether the writ enabled a cotenant to obtain re-

<sup>1</sup> *Lobdell v. Stowell*, 37 How. 93; 8. C. 51 N. Y. 70; *Channon v. Lusk*, 2 Lans. 211; *Fiquet v. Allison*, 12 Mich. 330; *Webb v. Mann*, 3 Mich. 139.

<sup>2</sup> *Ripley v. Davis*, 15 Mich. 78.

<sup>3</sup> *Co. Litt.* 200 b; *Cubitt v. Porter*, 8 B. & C. 269; *Stevens v. Thompson*, 17 N. H. 110.

<sup>4</sup> *Bowles' Case*, 11 Co. 82 b.



imbursement for repairs already made, or compelled the cotenants to unite in making such repairs as were shown to be necessary. In an early case in Massachusetts, the former theory was assumed to be correct,<sup>1</sup> and this case was followed as authority, and without any apparent consideration of its soundness, in another case in the same State,<sup>2</sup> and also in a case in the State of New York.<sup>3</sup> Quite recently, the question has been reconsidered in Massachusetts, and the earlier decisions overruled, because the Court was satisfied from the Latin forms of the writ, from the statement in Fitzherbert N. B. 127, and from the cases in the Year Books referred to by him, that "the writ *de reparatione* was a process to compel repairs to be made under the order of the Court," and "that there is nothing to indicate that an action for damages is maintainable by one tenant in common against another because the defendant will not join with the plaintiff in repairing the common property."<sup>4</sup> The writ seems to have been but rarely resorted to even in England, and probably has never been issued or demanded in the United States. At the present day, we know of no remedy, unless given by statute in some of the States, by which either cotenant may be forced to unite in making repairs, under order of the Court or otherwise. A cotenant who has made necessary repairs may, on that account, obtain a deduction from an amount which he might otherwise have to pay for mesne profits, or for rents and profits *received*; but we have never met with a case, in any form of action, wherein one cotenant recovered of another for either repairs or improvements made without the request of the defendant.<sup>5</sup>

<sup>1</sup> Doane v. Badger, 12 Mass. 65.

<sup>2</sup> Coffin v. Heath, 6 Met. 80.

<sup>3</sup> Mumford v. Brown, 6 Cow. 475.

<sup>4</sup> Calvert v. Aldrich, 99 Mass. 76.

<sup>5</sup> The common law rules governing actions between cotenants have been modified or abolished in many of the American States. The following note is intended to show the statutory provisions on this subject in most of the States:

ARKANSAS.—"When one or more joint-tenants, tenants in common, or coparceners in any real estate, or any interest therein, shall take, use, or have the profits thereof in greater portion than his interest therein, such person, or his executor or administrator, shall account therefor to his or their cotenant, jointly or severally.

"Such joint-tenants, tenants in common, and coparceners in any estate, real or personal, may maintain actions of account against their cotenants who receive as

bailiffs more than their due proportion of the benefits of such estate."—Gould's Digest of Ark., p. 95, secs. 1 and 2.

CALIFORNIA.—"If a guardian, tenant for life or years, joint-tenant or tenant in common of real property, commit waste thereon, any person aggrieved by the waste may bring an action against him therefor, in which action there may be judgment for treble damages."—Code of C. P., sec. 732.

CONNECTICUT.—"When two persons hold any estate as joint-tenants, tenants in common, or coparceners, if one of them shall receive, use, or take benefit of such estate in greater proportion than the amount of his interest in the principal estate, he and his executors or administrators shall be liable to render an account to his cotenant; and such cotenant, his executors or administrators, may bring an action of account against such receiver, and recover such sum as he has received more than his just proportion as aforesaid."—Sec. 264 Act Regulating Civil Actions, Rev. St. of Conn., p. 59.

DELAWARE.—"A tenant in common, or a joint-tenant, or a coparcener, may maintain against his cotenant an action in the case for use and occupation."—Rev. Code, 1874, p. 527, sec. 2.

"A tenant in common, joint-tenant, or coparcener, committing waste of the estate held in common, joint-tenancy, or coparcenary, shall be liable to an action of waste at the suit of his cotenant."—Ib., p. 536, sec. 4.

GEORGIA.—"Every tenant in common has the right to possess the joint property, and so long as he occupies no greater portion of it than his own share would be on division, and does not withdraw from it any of its essential value, such as mineral deposits, he is not liable to account for rent to his cotenant; but if he receives any rent or other profit, or commits any waste, or if he, by any means, deprives his cotenant of the use of his fair proportion of the property, or if he appropriates all to his exclusive use, or if the property is of such a character as that the use of it must necessarily be exclusive, then he is liable to account to his cotenant."—Sec. 2302 Code of Geo., ed. of 1873.

ILLINOIS.—The statute of this State in reference to accounting is almost identical with that of Arkansas. (See Rev. St. Ill., ed. of 1858, p. 211, secs. 1 and 2.) The statutes of Illinois also provide that, "If any person shall assume and exercise exclusive ownership over, or take away, destroy, or lessen in value, or otherwise injure or abuse any property held in joint-tenancy, tenancy in common, or coparcenary, the party aggrieved shall have his action of trespass or trover for the injury, in the same manner as he would have if such joint-tenancy, tenancy in common, or coparcenary, did not exist." (See same ed. Rev. St., p. 960, sec. 2.) Under this statute, trover may be sustained against a cotenant who keeps exclusive possession of a chattel—(Benjamin v. Strempel, 13 Ill. 466)—or who has converted a promissory note, (Boyle v. Levings, 28 Ill. 314.)

INDIANA.—"If a joint-tenant, or a tenant in common, or tenant in coparcenary, have, by consent, management of the estate, and make, with knowledge and without objection of his cotenant or coparcener, useful or necessary improvements, the cotenant or coparcener shall contribute rateably thereto.

"A joint-tenant, or tenant in common, or tenant in coparcenary, may maintain an action against his cotenant or coparcener for receiving more than his just proportion."—Rev. St. of Ind., vol. 2, p. 243, secs. 15 and 16, ed. of 1852.

KANSAS.—The statute of this State in regard to the liability of cotenants for improvements, and also in reference to accounting, is a copy of that of Indiana.—Genl. St. of Kansas, ed. of 1868, p. 541, secs. 21 and 22.

**KENTUCKY.**—"If a tenant in common, joint-tenant, or parcener, commit waste, he shall be liable to his cotenants, jointly or severally, for damages."—Genl. St., ed. of 1873, p. 607.

**MAINE.**—Any cotenant who, in this State, commits any waste without giving thirty days' notice in writing of his intention to enter upon and improve land, forfeits treble damages, for which either cotenant may sue without joining the others. (Rev. St. Me., p. 732.) "If any one or more of the joint-tenants, or tenants in common, take the whole rents or income of the joint estate, or more than their share, without the consent of their cotenants, and refuse, in a reasonable time after demand, to pay such cotenants their share thereof, any one or more of them may have an action of special assumpsit against the refusing cotenants, to recover their proportion thereof." (Ib., p. 734, sec. 16.) Trespass *quare clausum fregit* is a proper form of action to recover treble damages under the statute—(Mills v. Richardson, 44 Me. 79; Maxwell v. Maxwell, 81 Me. 184)—and the plaintiff in such action may recover *treble* the damages suffered by *the whole property*, including the interest of the defendant. (Hubbard v. Hubbard, 15 Me. 198.) The above statute in reference to accounting changes the rule of the common law, and makes the occupant liable for the benefits derived from his occupancy as well as from rents and profits received. (Cutler v. Currier, 54 Me. 81.)

**MASSACHUSETTS.**—Cotenant committing strip or waste liable to treble damages.—Genl. St. Rev. of 1860, p. 709, secs. 7, 8, 9.

**MICHIGAN.**—"One joint-tenant, or tenant in common, and his executors or administrators, may maintain an action for money had and received against his cotenant for receiving more than his just proportion of the rents or profits of the estate owned by them as joint-tenants, or tenants in common." (Comp. Laws Mich., ed. of 1871, p. 1366, sec. 38.) "If one joint-tenant, or tenant in common, shall commit waste of the estate held in joint-tenancy or in common, he shall be subject to an action on the case for such waste, at the suit of his cotenant or tenants."—Ib., p. 1792, sec. 3.

**MINNESOTA.**—"One joint-tenant, or tenant in common, and his executors or administrators, may maintain an action against his cotenant for receiving more than his just proportion of the rents or profits of the estate owned by them as joint-tenants, or tenants in common."—Rev. St. Minn., ed. of 1873, p. 885, sec. 25.

**MISSOURI.**—"If a tenant in common, joint-tenant, or parcener, commit waste, he shall be liable to his cotenants, jointly or severally, for damages." (Genl. St., ed. of 1865, p. 743, sec. 46; ed. of 1870, p. 884.) By sec. 49, if in any action of waste the jury find that the waste was wantonly committed, judgment shall be entered for three times the damages assessed.

**NEVADA.**—Cotenants of a mining claim who have proceeded to work or develop the claim, may each sue the other to recover for moneys expended in such work. See secs. 91 to 98 Comp. Laws Nev. These sections also provide the means of ascertaining the relative liability of each cotenant, and the manner of pleading and proceeding in suits brought under the act.

**NEW HAMPSHIRE.**—"One copartner, or joint-owner, may recover, in an action of assumpsit against another, his just share of any property received and wrongfully withheld by such other." "One cotenant of real estate may recover in such action against another for his share of any trees, fixtures, or other part of the estate destroyed, severed, or carried away by such other." (See Stone v. Aldrich, 43 N. H. 52.) "One cotenant of real estate may recover in such action of another taking the income thereof without his consent, and wrongfully withholding the same, all damages he may sustain thereby."—Genl. St. of N. H., ed. of 1867, p. 406-7, secs. 2, 3, and 4.

**NEW JERSEY.**—The statute of this State is, in substance, like the 27th section of the statute of Anne. (See Nixon's Digest, 4th ed., p. 5.) In regard to waste, (see Nix. Dig., p. 1022, sec. 5,) the statute of this State provides, "that an action shall lie by writ of waste;" that when such action comes to judgment, the defendant shall choose to have assigned to him, by a jury, a place certain, or else shall give security not to commit further waste; "and if he or she choose to take his or her part in a place certain, the same shall be assigned to him or her in the part wasted, as it was before he or she committed the waste; but if the defendant shall not choose to take his or her part in a place certain, or if the waste exceed his or her proportion, the plaintiff shall recover against such defendant such damages as shall be found by the jury or, inquest."

**NEW YORK.**—"One joint-tenant, or tenant in common, and his executors or administrators, may maintain an action of account, or for money had and received against a cotenant for receiving more than his proportion; and the like action may be maintained by them against the executors or administrators of such cotenant." (3 Rev. St. p. 89.) "If one joint-tenant, or tenant in common, shall commit waste of the estate held in joint-tenancy or in common, he shall be subject to an action of waste, at the suit of his cotenant or tenants." (Ib. 621.) "A tenant in common entering upon land, cutting and removing timber, and converting the same to his own use, is guilty of waste." (Elwell v. Burnside, 44 Barb. 447.)

**NORTH CAROLINA.**—"Where a joint-tenant, or tenant in common, commits waste, an action shall lie against him at the instance of his cotenant or joint-tenant." (Rev. Code, ed. of 1855, p. 598.) The same Code authorizes an action of account "by one joint-tenant and tenant in common against the other as bailiff for receiving more than comes to his just share or proportion." (Ib., p. 180.)

**OHIO.**—In this State, any cotenant may recover, "by civil action, his or her full share of all rents and profits which may have been received" by another cotenant, "according to the justice and equity of the case." (S. & S. Rev. St. Supp. p. 578.)

**OREGON.**—"A tenant in common may maintain any proper action, suit, or proceeding against his cotenant for receiving more than his just proportion of the rents or profits of the estate held by them in common." (Genl. Laws, p. 718-9.) If any tenant in severalty or in common, for life or for years, commit waste, he is liable to the party injured in an action at law for damages, in which action treble damages may be recovered. (Ib., p. 231-2.)

**PENNSYLVANIA.**—In this State, it is unlawful for the owner of any undivided interest to cut any timber trees without the consent of the other owners. No sale of timber so cut by one part owner shall pass any title. The party injured has the same remedy as though the cutting were done by an entire stranger, and may also sue out a writ of *estrepment* to prevent any further cutting or removing. (Brightly's Purdon's Digest, 1467-8.)

**RHODE ISLAND.**—Any joint-tenant, tenant in common, or coparcener, committing waste, forfeits double the amount of the waste so done; for which double amount any of the cotenants may maintain an action in the name of all. (Genl. St., ed. of 1872, p. 524.) "Whenever two or more persons have and hold any estate, interest, or property, whether real or personal, in common, as joint-tenants, tenants in common, coparceners, or joint-owners, and one or more of the owners of such common property shall take, receive, use, or have benefit thereof, in greater proportion than his or their interest therein, such owner or owners, his or their executors and administrators, shall be liable to render his or their account of the use and profit of such common property to his or their fellow-commoner or commoners, jointly or severally; and such the fellow-commoner or commoners, or any or either of them, their executors or admin-

istrators, may and are hereby authorized to have his or their action of account against such receiver or receivers, or either of them, as his or their bailiff or bailiffs, for receiving more than his or their part or proportion as aforesaid." (Ib., 532.)

VERMONT.—"The action of account may be brought and maintained by one or more parceners or coparceners or tenants in common, to settle and adjust their accounts and dealings in the same manner as is provided in actions between copartners."—Genl. St., p. 844, sec. 17.

VIRGINIA.—"If a tenant in common, joint-tenant, or parcener, commit waste, he shall be liable to his cotenants, jointly or severally, for damages."—Code of 1873, p. 967, sec. 2.

An action of account is also maintainable against a cotenant or his personal representative, "as bailiff, for receiving more than comes to his just share or proportion."—Ib., p. 994, sec. 14.

WEST VIRGINIA.—"If a tenant in common, joint-tenant, or parcener, commit waste, he shall be liable to his cotenants, jointly or severally, for damages."—Code of West. Va., ed. 1868, p. 525.

"An action of account may be maintained by one joint-tenant, or tenant in common, or his personal representative, against the other for receiving more than comes to his just share or proportion, and against the personal representative of any such joint-tenant or tenant in common."—Ib., p. 541.

WISCONSIN.—"One joint-tenant or tenant in common, and his executors or administrators, may maintain an action for money had and received against his cotenant, for receiving more than his just proportion of the rents or profits of the estate owned by them as joint-tenants, or tenants in common."—Taylor's Genl. Sts. 1163, sec. 38.

When divisible property is owned in common, and one of the cotenants is in possession of more than his share, the other cotenant may make a demand in writing; and if such demand is not acceded to, may recover his share, or the value thereof.—Ib., p. 1659, sec. 56.

"If one joint-tenant, or tenant in common, shall commit waste of the estate held in joint-tenancy or in common, he shall be subject to an action for such waste, at the suit of his cotenant or cotenants."—Ib., 1695.

## CHAPTER XIV.

### EQUITABLE REMEDIES BETWEEN-COTENANTS.

Accounting, § 321.

Contribution, § 322.

Injunctions, generally, § 323.

Injunction when Defendant is Insolvent, § 324.

Injunction when one Cotenant is Trustee or Lessee of the other, § 325.

Quieting Title, § 326.

Receivers, appointment of, § 327.

§ 321. **Accounting.**—Courts of equity have concurrent jurisdiction with courts of law of all matters of account between tenants in common, or other cotenants. Either cotenant may invoke the assistance of equity to compel an accounting, upon showing a necessity therefor, and cannot be deprived of this assistance merely because he has an adequate legal remedy by an action of account. In fact, the superior facilities offered by courts of equity when an accounting has become necessary, are such that these courts are almost universally resorted to in preference to the tribunals of the law.<sup>1</sup> But it has been determined that where the accounts are all on one side and are very simple, and no discovery is sought, courts of equity will decline taking jurisdiction of the case.<sup>2</sup>

§ 322. **"The liability to contribute is the result of a general equity, founded on the equality of burthens and benefits. To establish the right of contribution, the plaintiff must show that his payment has removed a common burthen from the shoulders of himself and the defendant, and that they are each benefited by it. This occurs in all cases of**

<sup>1</sup> *Leach v. Beatties*, 33 Vt. 199; *Rozier v. Griffith*, 31 Mo. 173; *Root v. Stow*, 13 Met. 5; *Field v. Craig*, 8 Allen, 357; *Story's Eq. Jur.* sec. 466.

<sup>2</sup> *Gloninger v. Hazard*, 42 Pa. St. 401.

payments made by one surety, on the debt for which several are bound—a common burthen is removed and a common benefit received. But the doctrine of contribution is not at all founded on contract: it applies to cases where the liability, it is true, arises out of a contract to which the plaintiff and defendant were parties. It is not, however, necessary that they should be bound by one contract: it may arise out of several, if they have thereby incurred a common liability. So, too, it applies to cases where the liability does not, in any shape, arise out of a contract, as when a common property, held by purchase, descent, or devise, is liable to the payment of a sum of money, and one is compelled to pay the whole, he shall have contribution from his cotenant.”<sup>1</sup> “So in the case of land descending to coparceners, subject to a debt: if the creditor proceed against one of the coparceners, the others must contribute. If the creditor discharges one of the coparceners, he cannot proceed for the whole debt against the others: at most, they are only bound to pay their proportions.”<sup>2</sup> The enforcement of contribution between cotenants seems to depend upon the same circumstances, and to be governed by the same principles, as when contribution is sought between persons who are not cotenants. If contribution be exacted from a cotenant for money expended in removing a paramount title or incumbrance from the common property, this is because a common burden has been removed and a common benefit received, and not because the complainant and defendant were seized of a common or joint estate. Precisely the same right of contribution would have arisen if the parties, instead of being cotenants, had been owners in severalty of lands embraced in and subject to the same mortgage or other lien. Therefore, Judge Story concludes his very brief notice of the subject of contribution between cotenants by saying: “It seems unnecessary to dwell upon these cases and others of like nature, as they embrace nothing more than a plain application of principles already fully expounded. We may conclude this head with the remark, that the remedial justice

<sup>1</sup> *Screven v. Joyner*, 1 Hill Ch. 260; *Harris v. Ferguson*, 2 Bai. 397; *Campbell v. Mesier*, 4 Johns. Ch. 337; *Thomas v. Hearn*, 2 Porter, 270; *Deering v. Earl of Winchelsea*, 1 Cox, 318; S. C. 2 Bos. & Pull. 270.

<sup>2</sup> *Stirling v. Forrester*, 3 Bligh O. S. 591.



of courts of equity, in all cases of apportionment and contribution, is so complete and so flexible in its adaption to all the particular circumstances and equities, that it has, in a great measure, superseded all efforts to obtain redress in any other tribunals."<sup>1</sup>

§ 323. Injunctions are but rarely granted to restrain a cotenant from exercising control over the joint property. To authorize an injunction, it must appear either that the defendant is *insolvent*, and will therefore be unable to indemnify the complaining cotenant, or that the act sought to be enjoined will effect a partial or entire destruction of the estate.<sup>2</sup> A court of equity will not interpose to stay waste unless it be of a malicious character, or of so unusual and unreasonable a nature as to savor of a wanton destruction of the estate.<sup>3</sup> If trees be of proper size and condition for market, neither cotenant will be enjoined from cutting and selling them,<sup>4</sup> while no valid objection to an injunction would exist if the timber consisted of sapling trees or underwood, not in a marketable condition; for in such a case, the cutting would be inconsistent with a prudent and legitimate enjoyment of the estate by a sole owner.<sup>5</sup> The digging of the soil and its conversion into bricks for purposes of sale may be enjoined.<sup>6</sup> If either cotenant sell, or attempt to sell, the entire subject of the cotenancy, he cannot thereby transfer any interest but his own. The cotenant not participating in the sale has an adequate remedy at law for the unauthorized assumption of authority over his interest. He may affirm the sale, and recover his share of the proceeds; or may disaffirm it, and hold the property as tenant in common with the vendee. Having these ample legal remedies, he cannot obtain an injunction to prevent the sale.<sup>7</sup> A partition at law will be enjoined in equity,

<sup>1</sup> Story Eq. Jur. sec. 505.

<sup>2</sup> *Obert v. Obert*, 1 Halst. Ch. 409; *Hole v. Thomas*, 7 Ves. 589; *Twort v. Twort*, 16 Ves. 128.

<sup>3</sup> *Kennedy v. Scovil*, 12 Conn. 327; *Bailey v. Hobson* L. R. 5 Ch. 180; 39 L. J. R. (N. S.) Ch. 270; *Goodwyn v. Spray*, 2 Dick, 667; *D. & S. R. R. Co. v. Wawn*, 3 Beav. 119; *Ackroyd v. Briggs*, 14 W. R. 25.

<sup>4</sup> *Arthur v. Lamb*, 2 Dr. and Sm. 490; *Martin v. Knowllys*, 8 T. R. 145.

<sup>5</sup> *Hole v. Thomas*, 7 Ves. 589; *Twort v. Twort*, 16 Ves. 128; *Hawley v. Clowes*, 2 Johns. Ch. 122.

<sup>6</sup> *Dougall v. Foster*, 4 Grant's Ch. 325.

<sup>7</sup> *Mason v. Norris*, 18 Grant's Ch. 500.



and a sale of the property ordered, when it appears that a division cannot be made without a great sacrifice of the interest of some of the cotenants.<sup>1</sup> Where the cotenancy embraces a water power or other valuable water privilege, equity will interpose to stay any destruction or invasion of the rights of either of the cotenants at the hands of the others. Thus, if either divert the water so as to prevent its employment in the uses for which it was designed, an injunction will be issued to restrain him,<sup>2</sup> unless it be proved that the diversion occasions no damage to the complainant.<sup>3</sup> Nor will a union of the majority in number or in interest of the joint owners of a water right authorize them to prosecute a plan or scheme in which they are agreed, if it involves any destruction of the common reservoir, or in any other way leads to a practical annihilation of the rights and interests of the minority.<sup>4</sup>

§ 324. Where the defendant was insolvent, or so near insolvency as to be unable to pay the excess of value beyond his own share, he has been restrained from committing waste.<sup>5</sup> In one instance a cotenant of crops was enjoined from removing *his share*, until damages alleged to have arisen from his non-compliance with the terms of the contract under which the land was let and the crops made, could be ascertained and decreed to be paid.<sup>6</sup> The execution of a judgment in favor of one cotenant and against the other cannot be stayed until an account is taken between them, unless it appears that the judgment-creditor is insolvent.<sup>7</sup>

§ 325. If one cotenant be trustee or lessee of the other, he may be restrained from committing any acts in reference to the common estate, for the prevention of which an injunction could issue, if he were trustee or lessee only. An injunction against an occupying tenant will not be denied because he is lessee of one moiety only and owner in fee of the

<sup>1</sup> *Gash v. Ledbetter*, 6 Ired. Eq. 183.

<sup>2</sup> *Bliss v. Rice*, 17 Pick. 23; *Kennedy v. Scovill*, 12 Conn. 327.

<sup>3</sup> *Norris v. Hill*, 1 Mich. 210.

<sup>4</sup> *Ballou v. Wood*, 8 Cush. 48.

<sup>5</sup> *Smallman v. Onions*, 3 Bro. C. C. 621.

<sup>6</sup> *Lewis v. Christian*, 40 Geo. 188.

<sup>7</sup> *McLendon v. Hooks*, 15 Geo. 533.

other moiety.<sup>1</sup> Nor will a trustee be permitted to violate his duties, nor to act contrary to equity and good conscience towards his *cestui que trust*, because he holds one moiety of the estate in his own right.<sup>2</sup> Ordinarily, no injunction will lie to prevent the removal of crops by a cotenant, though such removal be contrary to the custom of the country;<sup>3</sup> but where the defendant was the mother and natural guardian of complainants who were minors, it was held that her relation to them was that of trustee, and she was therefore enjoined from taking the whole crops.<sup>4</sup>

§ 326. **Quieting Title.**—Some of the authorities tend to establish the general proposition that a cotenant, whose right to possession with the other part owners is not denied, cannot sustain any adverse action against them, or either of them, to determine his and their, or either of their, respective interests in the joint property.<sup>5</sup> The 254th section of the California Practice Act authorized an action by any person in possession of real property against any other person claiming an adverse interest, for the purpose of determining such adverse claim. An action was brought, under this section, in which the plaintiff alleged that he was in possession of an undivided two-thirds of certain real estate, in which two-thirds the defendant wrongfully claimed an interest adversely to plaintiff. The defendant, answering, denied the interest of plaintiff, and claimed ownership in severalty. After the trial, the Court found that plaintiff was owner of two-thirds and defendant of one-third. Upon this state of facts, the Court said: “We can discover no valid reason why one tenant in common of real estate, in the actual possession thereof, may not maintain an action to determine the validity of an adverse claim of title by a cotenant, and no authority has been called to our notice which sustains a contrary view.”<sup>6</sup> A conveyance or mortgage by one cotenant, which purports to affect the entire estate,

<sup>1</sup> *Twort v. Twort*, 16 Ves. 128; *Dougall v. Foster*, 4 Grant's Ch. 324; *Christie v. Saunders*, 2 Grant's Ch. 670.

<sup>2</sup> Same as above.

<sup>3</sup> *Bailey v. Hobson* L. R. 5 Ch. 180.

<sup>4</sup> *Bates v. Martin*, 12 Grant's Ch. 491.

<sup>5</sup> *Lord v. Tyler*, 14 Pick. 163; *Martin v. Quattlebam*, 3 McCord, 205.

<sup>6</sup> *Ross v. Heintzen*, 36 Cal. 321.

does not create such a cloud upon the title of the other cotenants as a court of equity will interfere to remove.<sup>1</sup>

§ 327. A receiver has, in a few instances, been appointed on the application of one of the cotenants. In most of the early cases, the circumstances inducing the action of the Court cannot be ascertained from the reports.<sup>2</sup> No conclusion can, therefore, be drawn from these cases as to the grounds which warrant the interposition of the Court. Most of the more recent cases were so curtly disposed of as to leave us without any knowledge of the reasons which, in their own minds, justified the action of the Judges. We therefore find it impossible to state with precision the general principles upon which the action of courts of equity have been or will be predicated in disposing of applications for the appointment of receivers of undivided estates. It is certain, however, that the application will be denied, except in extreme cases.<sup>3</sup> In the case of *Holmes v. Bell*,<sup>4</sup> a receiver was appointed when one of the cotenants was in possession of the whole rents. This application was not made by nor on behalf of either cotenant, but by a third party, in a proceeding to foreclose a mortgage against both cotenants. In *Hargrave v. Hargrave*,<sup>5</sup> the plaintiff, an infant, insisted that he and defendant were co-heirs, entitled to the estate, and that outstanding terms existed which prevented the plaintiff from proceeding at law. The defendant was in possession of the whole. The prayer of the bill was for partition and accounting, and for a receiver. The defendant denied the plaintiff's legitimacy. The motion for a receiver was argued, and the Master of the Rolls said he would examine the cases and give judgment at a future day. He afterwards granted the order, but gave no reasons therefor. In a subsequent case, the parties were tenants in common of copyhold property, the legal estate being in a trustee for them. The defendant was

<sup>1</sup> *Ward v. Dewey*, 16 N. Y. 519.

<sup>2</sup> *Calvert v. Adams*, 2 Dick. 478; *Evelyn v. Evelyn*, 2 Dick. 800; *Street v. Anderson*, 4 Bro. C. C. 414.

<sup>3</sup> *Scurrah v. Scurrah*, 14 Jur. 874; *Norway v. Rowe*, 19 Ves. 159; *Milbank v. Revett*, 2 Meriv. 405; *Spratt v. Ahearne*, 1 Jones Ir. Exc. 50.

<sup>4</sup> 2 Beav. 298.

<sup>5</sup> 9 Beav. 549.

in possession, but there was no proof of exclusion. The plaintiff was allowed a receiver of his moiety.<sup>1</sup> Subsequently, it appeared that the conduct of the defendant amounted to an exclusion. A receiver was, therefore, appointed over the whole property.<sup>2</sup> From this last decision, it would seem that an exclusion is a prerequisite to the appointment of a receiver. But Sir John Leach, in another and earlier case, said: "I may observe that, even in the case of any actual exclusion of one Tenant in Common by another, I doubt whether this Court would appoint a Receiver. If it were an exclusion which amounted to an ouster at law, the party complaining must assert at law his legal title. If it were not such an exclusion, this Court would compel the Tenant in Common in Rent to account to his Companion; but would not, I think, act against his legal title to Possession; and the reason is, because the party complaining may at Law relieve himself by the Writ of Partition."<sup>3</sup> When the interest which the parties have in the land is held for the purposes of trade, and their relation to each other resembles that of partners, a receiver may be appointed, though the facts would not justify that action if the parties were ordinary tenants in common. A colliery or mine is in the nature of a trade, and where persons have different interests in it, it is to be regarded as a partnership. Therefore, where there are several shares, as each owner cannot employ a separate manager or set of workmen, the Court will appoint a manager or receiver for them all, under the same circumstances which would justify such appointment, in the case of a regular copartnership.<sup>4</sup> In Georgia, the proposition is maintained "that a court of equity has jurisdiction to appoint a receiver, at the instance of one tenant in common against his cotenants, who are in possession of undivided valuable property, receiving the whole of the rents and profits, and excluding their companion from the receipt of any portion thereof, when such tenants are insolvent."<sup>5</sup> A receiver will never be appointed unless it is

<sup>1</sup> *Sandford v. Ballard*, 30 Beav. 109.

<sup>2</sup> *Sandford v. Ballard*, 33 Beav. 402.

<sup>3</sup> *Tyson v. Fairclough*, 2 Sim. & Stu. 143.

<sup>4</sup> *Jefferys v. Smith*, 1 Jacob & W. 302; *Hill v. Taylor*, 22 Cal. 194; *Fereday v. Wightwick*, 1 Russ. & M. 46.

<sup>5</sup> *Williams v. Jenkins*, 11 Geo. 593.

necessary for the protection of complainant's rights. But where personal property is in the exclusive possession of one of the cotenants who refuses to divide or sell it, or to allow his cotenant to participate in its enjoyment, a receiver may be appointed, unless the defendant gives adequate security to reimburse the complainant for the deterioration or destruction of the property by use, and compensates him for the value of the beneficial enjoyment of such property.<sup>1</sup> In partition, the Court will appoint a receiver during the pendency of the action, to preserve the complainants from serious loss, where it is shown that they are unable to rent portions of the property, or to collect rent of other portions rented, in consequence of the conduct of the defendant.<sup>2</sup>

<sup>1</sup> *Low v. Holmes*, 17 N. J. Eq. 150.

<sup>2</sup> *Pignolet v. Bushe*, 28 How. Pr. 9.

## CHAPTER XV.

### ACTIONS BY COTENANTS AGAINST STRANGERS TO THE COTENANCY.

#### ACTIONS AT LAW.

- General View of the Rights and Remedies of Cotenants, § 328.
- Joinder of Joint-Tenants, § 329.
- Joinder of Coparceners, § 330.
- Joinder of Tenants in Common, § 331.
- Joinder in case of Mixed Cotenancy, § 332.
- Assumpsit, § 333.
- Avowries, § 334.
- Case, § 335.
- Covenants, § 336.
- Detinue and Replevin, § 337.
- Detinue and Replevin of Severable Chattels, § 338.
- Ejectment by Joint-Tenants, § 339.
- Ejectment by Coparceners, § 340.
- Ejectment by Tenants in Common, § 341.
- Ejectment where interest of Plaintiff is improperly described, § 342.
- Ejectment, whether one can recover the whole, § 343.
- Forcible Entry and Unlawful Detainer, § 344.
- For Insurance, § 345.
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- Trespass, § 347.
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- Waste, § 350.
- Proceedings to Restrain or Abate a Nuisance, § 351.
- Proceedings to obtain Damages for Location of Highway, § 352.
- Failure to object to Non-Joinder of Cotenant, § 353.
- Failure to object to Non-Joinder of Cotenant in Actions on Contracts, § 354.
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- Failure to object to Non-Joinder, whether entitles Plaintiff to recover the whole, § 356.
- Failure to object to Non-Joinder of Joint-Tenant, § 357.
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- Joining Persons who are not Cotenants, § 359.
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Misjoinder, how taken advantage of under the Codes, § 361.  
 Death of one Cotenant before suit, § 362.  
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 Foreclosure by Co-Mortgagees, § 372.

§ 328. **General view of the Rights and Remedies of Cotenants as against Strangers.**—The rights of cotenants as against strangers to the cotenancy do not require any further consideration in this work than such as will be given in treating of the actions by which those rights are enforced. Cotenants are protected in their rights of property as against third persons by the same general rules of law which are provided for the protection of owners in severalty. Rights of property vested in two or more in moieties are as absolute and as sacred as though vested in one alone; and these rights are by law as amply secured from invasion by strangers as are rights held in severalty. The mere recognition or declaration of a right adds little or nothing to the security of the person declared to be entitled to its enjoyment. Adequate legal means must be furnished to compel strangers to respect the right, or if not to compel respect, at least to indemnify the injured party for all invasions of the right. And the legal means provided for protecting the rights and redressing the wrongs of cotenants are in general identical with those available for like purposes to owners in severalty. If a particular form of action be proper in the case of a sole owner, it will, under like circumstances, be equally proper in the case of part owners. If, under any given state of circumstances, co-owners are without any legal or equitable means of redress as against a third person, it may be taken for granted that a sole owner would, in like circumstances, be equally without the reach both of legal and of equitable aid. We need not,

therefore, in this chapter, pursue any investigation either as to what facts constitute a *cause* of action, nor as to what *form* of action should be selected when a good cause is discovered; for such investigations have been sufficiently pursued in many treatises relating to ownership in severalty. The only question which it is necessary to discuss in this chapter is, must cotenants join or sever in employing the legal and equitable remedies with which they, in common with owners in severalty, have been provided by law?

§ 329. **Joinder—General Rule as to Joint-Tenants.**—In considering the actions which cotenants may sustain against third persons, the first question which thrusts itself upon our attention is this, can each of the cotenants seek redress in an independent suit, or must all of them join to obtain the enforcement of their rights and the redress of their wrongs? So far as real actions are concerned, the answer to this question corresponds with the nature of the cotenancy. Whenever the title of the cotenants, as in case of joint-tenancy and coparcenary, is joint, the action must also be joint; and whenever, as in tenancy in common, such tenant is deemed to possess a separate and distinct estate, the remedy of each must be distinctly and separately pursued. “Jointenants being seized *per mie et per tout*, and deriving by one and the same title, must jointly implead and be impleaded.”<sup>1</sup> “If twenty jointenants be, and they be disseized, they shall have in all their names but one assize, because they have but one joynt title.”<sup>2</sup> “Where one of two jointenants, demandants in a real action, refuses to prosecute the suit, he may be summonsed and severed, and the other jointenant may recover his moiety without him.”<sup>3</sup>

§ 330. **Joinder—General Rule as to Coparceners.**—As a general rule, the statements made in the preceding section in reference to the joinder of joint-tenants are equally applicable to coparceners.<sup>4</sup> “Coparceners, though several persons, are

<sup>1</sup> Roscoe on Actions, 6; Co. Litt. 180 b; 3 Rob. Pr. 158; Barbour on Parties, 187; Bac. Ab. Joint-Tenants K.

<sup>2</sup> Litt. sec. 311.

<sup>3</sup> Roscoe on Actions, 6-7; Co. Litt. 188 a; Bac. Ab. Joint-Tenants K.

<sup>4</sup> Co. Litt. 164 a and 180 b.



but one heir, and have one-entire freehold in the land as long as it remains undivided, and must, therefore, in general, join in a real action. Where parceners sue in a real action ancestral, and the right descends to them from one and the same ancestor, then, though they be in several degrees from the common ancestor, they may join; but the issue of several coparceners cannot join as heirs to their mothers, because several rights descend. Thus, if a man hath issue two daughters, and is disseized and dies, and the daughters have issue and die, the issues shall join in a *præcipe*, because one right descends from the ancestor; but if the two daughters had been actually seized and subsequently disseized, then, after their decease, the issues shall not join, because several rights descended to them from several ancestors. If coparceners are disseized before partition, their possessory action must be joint, for their remedy must follow the nature of their possession; and that being joint, the remedy must be joint also.”<sup>1</sup>

§ 331. **Joinder, of Tenants in Common.**—As tenants in common have no joint interest, but hold several and distinct estates, and have several freeholds, they could not at common law sustain a joint real action. It was necessary for each to sue separately in reference of his own moiety of the lands of the cotenancy.<sup>2</sup> But “where the thing to be recovered in a real or mixed action is entire, there, of necessity, tenants in common must join, as in *quare impedit*, or writ of right of ward by tenants in common of a seignory.”<sup>3</sup> “The general rule in relation to suits by tenants in common, against third persons, is this: When the action is in the realty, they must sue separately; when it is in the personalty, they must join.”<sup>4</sup> “As to actions personals tenants in common may have such actions personals jointly in all their names, as of trespass, or of offences which concerne their tenements in common, as for breaking their houses, breaking their closes, feeding

<sup>1</sup> Roscoe on Actions, 7-8; Litt. sec. 313.

<sup>2</sup> Roscoe on Actions, 7-9; 3 Rob. Pr. 159; Bac. Ab. Joint-Tenants K; May v. Slade, 24 Tex. 207; Briscoe v. McKee, 2 J. J. Marsh. 372; Rand v. Dodge, 12 N. H. 68; Stevenson v. Cofferin, 20 N. H. 150.

<sup>3</sup> Roscoe on Actions, 8.

<sup>4</sup> Hill v. Gibbs, 5 Hill, 58.

wasting and defowling their grasse, cutting their woods, for fishing in their pischary, and such like. In this case, tenants in common shall have an action jointly, and shall recover jointly their damages, because the action is in the personalty and not in the realty."<sup>1</sup> Mixed actions by tenants in common are subject to the same rule as real actions, in this, that the cotenants must sever, except in cases where their joinder would be justified if the action were in the realty.<sup>2</sup> The difference between the rules applicable to the joinder of tenants in common and to the joinder of coparceners, and the reasons upon which those rules were based, were thus stated by Chief Justice Gilchrist, of New Hampshire: "By the common law, there were certain serious embarrassments which would have attended the joinder of tenants in common in real actions. Although their possession was joint, their estates and titles might have been wholly different; and as these were in many cases required to be stated, and might have been traversed or avoided by plea, it is easy to perceive that numerous issues might have been joined in a single action, to some of which some of the parties to the suit might have been strangers, and yet bound to maintain them, under pain of failing in the action. This afforded sufficient ground for the rule which not only permitted but required tenants in common to sever in such actions. With respect to coparceners, the case was otherwise. The manner in which such estates originated, which was always by descent, rendered it practically more convenient for them to join, and their estate being the same, one issue only, of course, could be made. These, therefore, the common law rigidly required to join in real actions for the recovery of their estate. But because it sometimes became impracticable, either from the refusal of some of the parties, or from other causes, for all to prosecute a joint action, provision was made by summons and severance for such as chose to prosecute, by which they were enabled to proceed without the defaulted parcener."<sup>3</sup>

<sup>1</sup> Coke on Litt. sec. 315; *Austin v. Hall*, 13 Johns. 286; *Roscoe on Actions*, 7; *White v. Brooks*, 43 N. H. 402; *Irwin's Admr. v. Brown's Exr.*, 35 Pa. St. 332; *Gilmore v. Wilbur*, 12 Pick. 124; *Lane v. Dobyns*, 11 Mo. 107.

<sup>2</sup> *Roscoe on Actions*, 7; *Littledale, J., in Doe d. Poole v. Errington*, 1 Ad. & E. 755; 7 *Property Lawyer*, 73.

<sup>3</sup> *Stevenson v. Cofferin*, 20 N. H. 151.

§ 332. **Mixed Cotenancy.**—We have now given the general rules established and enforced by the common law, in reference to the joinder of joint-tenants, coparceners, and tenants in common. But it often happens that lands are held by a mixed cotenancy, as where one-third is held by tenancy in common and the residue in joint-tenancy. In such case, no single real action can be sustained in reference to the entire lands. The joint-tenants must join in the action so far as it refers to their moiety, and the tenant in common must bring a separate action in reference to his moiety. This is equally true whether the moiety held as a tenancy in common is vested in one of the joint-tenants or in a third person.<sup>1</sup> “Also, if three joyntenants be, and one release to one of his fellowes all the right which he hath, &c., and after the other two be disseized of the whole, &c., in this case the two others shall have several assise, &c., in this manner, viz., they shall have in both their names an assise of the two parts, &c., because the two parts they held jointly at the time of the disseizin. And as to the third part, he to whom the release was made, ought to have of that an assise in his own name, for that he (as to the same third part) is thereof tenant in common, &c., because he commeth to this third by force of the release, and not only by force of the joynture.”<sup>2</sup>

§ 333. In actions of *assumpsit* cotenants may properly be joined,<sup>3</sup> according to expressions contained in some of the decisions; but it is maintained by the great majority of the authorities that cotenants not only may but *must* join in *assumpsit*, unless the non-joinder be waived by the defendant.<sup>4</sup> In Alabama, this question has been considered on several occasions. The Judges there arrived at a conclusion which they announce to be “the result of sound reason and the best authorities, that when a conversion has been committed against several, all the parties in interest waiving the tort may join, if they like, in an action of *assumpsit*; but that they are under

<sup>1</sup> Roscoe on Actions, 6.

<sup>2</sup> Litt. sec. 312.

<sup>3</sup> Price v. Pickett, 21 Ala. 741.

<sup>4</sup> Gilmore v. Wilbur, 12 Pick. 124; Irwin's Admr. v. Brown's Exr. 35 Pa. St. 332; Mooers v. Bunker, 9 Foster, 427; Putnam v. Wise, 1 Hill, 234.

no legal compulsion to do so, for that any number less than all, or any separate one, may bring *assumpsit* for his or their share or interest without joining the rest."<sup>1</sup>

§ 334. **Avowries.**—"Originally those making avowries in distress for rent were obliged to set out their title in the avowry, and then prove that title as set out, and great nicety was required in this part of the case, and great difficulty in hunting up and proving old deeds."<sup>2</sup> Co-owners making an avowry were subjected, as to joinder, to the rules applicable to them when they were prosecuting real actions. Where their title was joint, as in case of parceners and joint-tenants, all were required to join in the avowry; or if one alone had distrained, he might avow in his own right and as bailiff to the other, in which case the return was adjudged to him in his own right and as bailiff to the other.<sup>3</sup> Tenants in common, on the other hand, as they held separate and distinct estates, were required to sever in making an avowry.<sup>4</sup> "If two tenants in common make a lease of their tenement, for a term of years rendering rent, if the rent be behind, they shall have an action of debt against the lessee, and not divers actions, for the action is in the personalty. But in an avowry for rent, they ought not to be joined, for this is in the realty; and this distinction between debt for rent and avowry appears to have been uniformly recognized. The reason is, that the avowry savors of the realty; but until distress and avowry, the rent is in the personalty, and then it can be released by one of the tenants in common. It is the distress on the land which makes the rent partake of the realty."<sup>5</sup>

§ 335. **In the prosecution of an action on the case to recover for damages arising from a tort, as where tenants in common or other cotenants of a mill sue to recover for**

<sup>1</sup> Tankersley v. Childers, 23 Ala. 783; Smith's Exr. v. Wiley, 22 Ala. 405.

<sup>2</sup> Jones v. Gundrim, 8 Watts & S. 534.

<sup>3</sup> Pullen v. Palmer, 5 Mod. 73; S. C. 3 Salk. 207; Leigh v. Sheppard, 2 Bro. & B. 465; Stedman v. Bates, 1 Ld. Raym. 64; Osmer v. Sheafe, Lutw. 1210; Culley v. Spearman, 2 H. Bla. 388.

<sup>4</sup> Litt. sec. 817; 3 Rob. Pr. 157-8; Culley v. Spearman, 2 H. Black, 388; Harrison v. Barnby, 5 T. R. 249; Dalson v. Tyson, 3 Salk. 204; Wilkinson v. Hall, 1 Bing. N. C. 718.

<sup>5</sup> Decker v. Livingston, 15 Johns. 481.

diverting and withholding water from their mill, or where cotenants of a reversion seek to recover for injuries to their reversionary interest, all the cotenants may and ought to join.<sup>1</sup> So tenants in common must join in an action on the case for destroying their charter or their title deeds.<sup>2</sup>

§ 336. In regard to covenants, it is said to have "been settled from an early day that all covenants, including covenants for title, are to be construed as joint or several, according to the interest taken by the parties to whom they are made, or in whom the right to take advantage of them has vested. Thus, in *Slingsby's case*,<sup>3</sup> which is generally cited as the leading authority, where the defendant granted to four, although he covenanted 'with each and every of them' that he was seized in fee, yet it was held that all must join in an action on the covenant, and this principle has since been recognized in many other cases."<sup>4</sup> Covenants for title may be personal merely, or they may run with the land. Actions on the former are regarded as personal. Therefore, the several covenantees must join in pursuing their remedy against the covenantor.<sup>5</sup> In reference to covenants running with the land, the general rule is that if the covenantees "have a joint interest in, and are jointly entitled to, the estate to which the covenants are annexed, they must bring a joint action upon the covenants; and separate actions when they have several estates, and a separate and distinct damage has accrued to each. Joint-tenants must sue jointly in respect of their joint estate."<sup>6</sup> "Upon covenants running with the land, and coming to parties either as tenants in common or joint-tenants, the action must be joint or several, according as a joint duty arises in favor of all, or separate duties to each."<sup>7</sup> If a covenant of general warranty be broken by the eviction of the heirs of the covenantee, they must jointly sue the

<sup>1</sup> *Rich v. Penfield*, 1 Wend. 385; *Putney v. Lapham*, 10 Cush. 232; *Addison on Torts*, 67.

<sup>2</sup> *Daniels v. Daniels*, 7 Mass. 135.

<sup>3</sup> 5 Coke, 18.

<sup>4</sup> *Rawle on Covenants*, 557.

<sup>5</sup> *Lawrence v. Montgomery*, 37 Cal. 189.

<sup>6</sup> *Addison on Contracts*, 784.

<sup>7</sup> *Addison on Contracts*, 785; *Magnay v. Edwards*, 13 C. B. 479; S. C. 22 L. J. C. P. 170.

covenantor. He is not liable to as many suits as there are heirs of his grantee.<sup>1</sup> But if a deed containing covenants of general warranty be made to several as tenants in common, each thereby acquires a several freehold, and, in the event of his subsequent eviction by title paramount, may sustain a separate action against the warrantor.<sup>2</sup> "If lands are granted to three as tenants in common, with warranty to all jointly, it is nevertheless several to each. Here, it will be noticed, that the warranty has relation to the right, (as all covenants for title have,) not the possession; and also, that the advantage it promises one is nothing to the other, no community of right or title subsisting between them. But where a covenant with tenants in common respects their possession, the case is changed, and all are jointly concerned, since their possession to which it is accessory is joint, and the benefit proposed the same to each."<sup>3</sup> A covenant made by a lessee in favor of his lessors, who are tenants in common, that he will keep the premises in repair, is a covenant in which all the lessors have a joint interest. They are therefore required to bring a joint action for damages occasioned by a breach of such covenant. This is true although the lease in which the covenant was inserted reserves rent payable to the several owners in proportion to their respective interests. In discussing this question, the Supreme Court of the United States said: "The instrument on which the plaintiffs instituted their suit was a lease from the plaintiffs and various other persons interested in different proportions in the property demised, and by the terms of which lease rent was reserved and made payable to the several owners in the proportion of their respective interests. So far as the reservation and payment of rent to the covenantees, according to their several interests, made a part of the lease, the contract was several, and each of the covenantees could sue separately for his portion of the rent expressly reserved to him. But in this same lease, there is a covenant between the proprietors and the lessee, that the latter

<sup>1</sup> *Paul v. Witman*, 3 Watts & S. 408; *Tapscott v. Williams*, 10 Ohio, 443; *Decharms v. Horwood*, 10 Bing. 526.

<sup>2</sup> *Swett v. Patrick*, 11 Maine, 179; *Lamb v. Danforth*, 59 Maine, 324.

<sup>3</sup> *Hammond on Parties*, 30. But in Maine, tenants in common need not join in an action against their grantor for a breach of the covenants of warranty in his deed. *Lamb v. Danforth*, 59 Me. 324.

shall keep the premises in good and tenantable repair, and shall return the same to the proprietors in the like condition, and it is upon this covenant, or for the breach thereof, that the action of the plaintiffs has been brought. Is this a joint or several covenant? It has been contended that it is not joint, because its stipulations are with the several covenantees jointly and severally. But the answer to this position is this: Are not all the covenantees interested in the preservation of the property demised, and is any one, or a greater portion of them, exclusively and separately interested in its preservation? And would not the dilapidation or destruction of that property inevitably affect and impair the interests of all, however it might and necessarily would so affect them in unequal amounts? It would seem difficult to imagine a condition of parties from which an instance of joint interests could stand out in more prominent relief. This conclusion, so obvious upon the authority of reason, is sustained by express adjudications upon covenants essentially the same with that on which the plaintiffs in the case have sued."<sup>1</sup>

§ 337. **Replevin and Detinue.**—Each cotenant has a right to the possession of all the chattels of the cotenancy equal to the right of each of his companions in interest, and superior to that of all other persons. In a contest carried on at law to recover the possession of a chattel from a person having no right to such possession, and in behalf of a cotenant having such right, it would seem that such contest ought to result in favor of the cotenant, and against the third person. Clearly the cotenant is entitled to the possession, and as clearly the stranger to the cotenancy is not. Notwithstanding this clear right in the cotenant, it is certain that, by the common law, the possession of a chattel could not be recovered from a stranger, in an action brought by less than all the owners thereof, if he thought proper to avail himself of the non-joinder of the others.<sup>2</sup> This rule was equally applicable whether the

<sup>1</sup> *Calvert v. Bradley*, 16 How. U. S. 596. See also *Foley v. Addenbrooke*, 4 Ad. & El. 197; *Kitchen v. Buckley*, 1 Lev. 109; S. C. 1 Sid. 157; *Bradburne v. Botfield*, 14 Mees. & W. 559; *Thompson v. Hakewell*, 19 C. B. (N. S.) 713; S. C. 35 L. J. (N. S.) C. P. 18; 3 Rob. Pr. 159; *Servante v. James*, 10 Barn. & C. 410.

<sup>2</sup> *Bell v. Hogan*, 1 Stew. 537; *D'Wolf v. Harris*, 4 Mason, 538; *Hart v. Fitzgerald*, 2 Mass. 511; *Gardner v. Dutch*, 9 Mass. 426; *May v. Parker*, 12 Pick. 38; *Rogers v.*



owners were joint-tenants, coparceners, or tenants in common. In the vast majority of the decisions upon this subject, no other reason is given than that, by the general rule of the common law, all cotenants must join in actions personal. No doubt this is the best reason that can be given, and is the only one upon which the decisions can be clearly justified. Judges have, however, occasionally undertaken to ground their decisions upon this subject upon something in addition to a mere technical rule of the common law. Thus, Black, Justice, in the case of *Prichard's Admr. v. Culver*,<sup>1</sup> said: "The *primary* object of the action is to recover back the chattel itself, and damages for taking and detaining it follow such recovery. The *secondary* object of the action is to recover a sum of money equivalent to the value of the property claimed, and likewise a compensation for the injury sustained by the plaintiff, if the defendant will not yield possession of the property for the recovery of which the suit has been instituted. Where the chattel is held in joint-tenancy or in common, the right of possession is in all the tenants or part owners, and not of any one of them. Until there is a severance, no one of the owners can by law sustain a claim to the exclusive possession of the chattel. His right to the possession is no stronger than that of his cotenant. If such were not the rule of law, and there were six owners in joint-tenancy or in common, five of these owners might institute their separate actions of replevin against the sixth cotenant, each claiming the possession by his suit, and each might obtain a judgment for the restoration of the property, or damages to its value. To which of the five should the sheriff deliver the property, if the defendant should not give security on the writ being served? \* \* \* In our judgment, therefore, a joint-tenant or tenant in common cannot maintain replevin for his share of an undivided chattel against his cotenant, nor, as we conceive, against a third person who may happen to have possession of it. The right to the possession is an

Arnold, 12 Wend. 30; *Reiniheimer v. Hemingway*, 35 Pa. St. 438; *Cain v. Wright*, 5 Jones Law, 283; *Coster v. N. Y. and Erie R. R. Co.*, 6 Duer, 46; S. O. 3 Abb. Pr. 846; *Price v. Talley's Admr.* 18 Ala. 25; *Parsons v. Boyd*, 20 Ala. 117; 1 Chitty Pl. 163; *McArthur v. Lane*, 15 Me. 246.

<sup>1</sup> 2 Harr. Del. 129.



*entire* right, and all the owners must unite in the action." The rule that an action of detinue cannot be maintained unless the plaintiff has the entire interest in the thing sued for, seems to admit of no exception and to yield to no considerations of hardship or inconvenience. In Alabama, an infant owning one-fourth of certain slaves died. By the law in force in that State, the personal property of a deceased person did not on his death vest in his heirs, and they could maintain no action for its recovery until they could deduce title through an administrator in virtue of the statute of distributions. After the death of the infant, the other part owners, who were also the infant's heirs at law, brought an action of detinue to recover the slaves. No administrator had ever been appointed on the infant's estate. The plaintiffs in the action were met and overcome with the objection that they did not have an entire interest in the property sought to be recovered.<sup>1</sup> In an action of detinue for a horse, the evidence adduced established that the plaintiff's father gave him one-half of the horse for raising it; that plaintiff had been in possession of the horse several years when the father gave his half to the daughter of the plaintiff, then an infant three or four years of age. The terms of this gift were that plaintiff should do as he pleased with the horse, but should let the daughter have one-half of him. Soon after this gift to the daughter, the horse came into the possession of a third person. The father of the infant then owning one-half of the horse, in his own right brought an action of detinue without joining his daughter. The Court held that, under the circumstances, the plaintiff should be treated either as bailee or as trustee of his daughter; and that whether considered as bailee or trustee, he could sustain this action as against a stranger to the title.<sup>2</sup>

§ 338. **Replevin of Severable Chattels.**—When the property of a cotenancy is in its nature severable, so as to authorize either of the parties to make a division thereof, or to authorize an officer to make a severance thereof upon levying upon the interest of the cotenant, the part severed be-

<sup>1</sup> *Miller v. Eatman*, 11 Ala. 614.

<sup>2</sup> *Kirk v. Kirk*, 3 Dana, 54.

comes the sole property of him in whose behalf the severance was effected. Hence, if an officer levy upon severable chattels exempt from execution, and make a severance thereof, the cotenant upon whose interest the levy was made may, without joining his companion, sustain an action against the officer, and recover from him the chattels which he has severed and has undertaken to appropriate to the satisfaction of his writ.<sup>1</sup>

§ 339. **Ejectment by Joint-Tenants.**—Joint-tenants should join in actions to recover possession of their realty.<sup>2</sup> But joint-tenants may make separate demises. Each may therefore recover in ejectment on his separate demise, for such demise operates as a severance of the joint-tenancy.<sup>3</sup>

§ 340. **Ejectment by Coparceners.**—Parceners may declare on a joint demise,<sup>4</sup> or each may declare on her several demise.<sup>5</sup> They may therefore sue jointly for the possession of their real estate, or each may sue for her moiety.

§ 341.—**Ejectment by Tenants in Common.**—According to the rules of the common law, tenants in common could not join in ejectment.<sup>6</sup> “From the character of the estate in common, tenants in common cannot join in an action for the recovery of the estate. The interest of each is separate and distinct. The subject of the action in such case would be the whole estate, and it cannot be said that either of the parties is interested in the whole estate, but only in an undivided moiety.”<sup>7</sup> The reason for this rule of the common law was well explained by Tilghman, C. J., in *White v. Pickering*,<sup>8</sup> by the use of the following language: “In making out the plaintiffs’ title, it appeared that they were tenants in common, and

<sup>1</sup> *Newton v. Howe*, 29 Wis. 534.

<sup>2</sup> *Dewey v. Lambier*, 7 Cal. 347.

<sup>3</sup> *Roe v. Lonsdale*, 12 East, 39; *Doe v. Reed*, 12 East, 57; *Doe v. Fenn*, 3 Camp, 190.

<sup>4</sup> *Boner v. Juner*, Ld. Raym. 726.

<sup>5</sup> *Doe v. Pearson*, 6 East, 179; *Roe v. Lonsdale*, 12 Ib. 39.

<sup>6</sup> *Mantler v. Wollington*, Cro. Jac. 166; *Hillhouse v. Mix*, 1 Root, 247; *Rogers v. Turley*, 4 Bibb. 855; *DeJohnson v. Sepulbeda*, 5 Cal. 150; *Doe v. Potts*, 1 Hawks, 469; *Wathen v. English*, 1 Mo. 746; *Innis v. Crawford*, 4 Bibb. 241; *Dube v. Smith*, 1 Mo. 313; *Gaines v. Buford*, 1 Dana, 481; *Doe v. Errington*, 1 Ad. & El. 750; *Moore v. Funsden*, 1 Show, 842; *Heatherby v. Weston*, 2 Wils. 233.

<sup>7</sup> *Thockmorton v. Burr*, 5 Cal. 400.

<sup>8</sup> 12 Serg. & R. 435.

the declaration setting forth a joint demise from all the plaintiffs, the defendants' counsel insisted that the plaintiffs ought not to recover, because the title given in evidence was inconsistent with the declaration. Although the action of ejectment is founded on a fiction, contrived for the convenience of suitors, yet there is a certain point where fiction ends and truth begins. The lease by the lessor of the plaintiff is a fiction: he is therefore not required to prove that such a lease was actually made. But it is necessary to show such an estate as would have given him a right to make the lease set forth in the declaration. Therefore, if it appear that the title of the lessor of the plaintiff was not vested in him till after the commencement of the lease he cannot recover. This is a principle which cannot be denied; so that the question simply is, whether the title set forth in the declaration accords with the title given in evidence. The declaration states that all the plaintiffs jointly demised the land: the evidence proved that the plaintiffs had *separate* interests in the land, and that each had only *an undivided part*; consequently, neither of them had a right to demise *the whole*. There is no privity between the plaintiffs: the estate of each is distinct from the other; and they cannot join in a demise, such as is set forth in the declaration." But the rules of the common law in regard to tenants in common suing for possession of the lands of the cotenancy have been so modified in most of the States of the American Union, as to permit the tenants in common to sue jointly whenever they choose so to do.<sup>1</sup> This modification has generally resulted from statutory enactments. This, however, has not been universally the case, for there are decisions in which, independent of statutory considerations, the right of tenants in common to make a joint demise, and the consequent right of their lessor to maintain ejectment, have been vigorously sustained.<sup>2</sup>

§ 342. **Whether Cotenant can recover different interest than one sued for.**—The general proposition of law that the plaintiff may recover less but never more than he sues for,

<sup>1</sup> Poole v. Fleeger, 11 Pet. 212; Gray v. Givens, 26 Mo. 303; Hicks v. Rogers, 4 Cranch, 165; Hillhouse v. Mix, 1 Root, 247; Swett v. Patrick, 11 Me. 180.

<sup>2</sup> Jackson v. Bradt, 2 Cai. 173; Alford v. Dewin, 1 Nev. 211; Nixon v. Potts, 1 Hawks, 470; Hoyle v. Stow, 2 Dev. 321; Barrow's Lessee v. Nave, 2 Yerg. 228.

applies to actions brought by a tenant in common to recover possession of real estate. It has sometimes been held that to permit a plaintiff suing for the whole to recover on proof of right to a moiety, or when suing for a specified moiety to recover upon showing his right to a smaller moiety, would involve the Court in the technical difficulty of having a judgment and verdict not corresponding to the complaint, "inasmuch as a different title is established in the former from that which is described in the latter." On this account, there have been instances in which plaintiffs, though showing a clear right to a lesser interest than that alleged to have been demised to them, were not allowed to recover anything.<sup>1</sup> But the weight of the authorities now bears in an opposite direction, and in favor of the rule that plaintiff claiming the whole may recover a part; or claiming a specific part, may recover a smaller portion.<sup>2</sup>

§ 343. **Whether one can recover possession of the whole.**—A tenant in common is, as against every person but his cotenants, entitled to the possession of every part of the common lands. He may therefore, in most of the States, recover the possession of all such lands in an action of ejectment brought against a stranger to the common title.<sup>3</sup> In one instance where it was insisted that a tenant in common could recover only to the extent of his interest, the Court said: "It has been so often held that one tenant in common can recover the entire premises as against a mere trespasser without joining his cotenants as plaintiffs, we are surprised that counsel should make the last point presented in their brief."<sup>4</sup> Notwithstanding the surprise expressed by the Court

<sup>1</sup> *Cole v. Irvine*, 6 Hill, 639; *Holmes v. Seely*, 17 Wend. 75; *Gillett v. Stanley*, 1 Hill, 121; *Carroll v. Norwood*, 5 Har. & J. 155.

<sup>2</sup> *Dewey v. Brown*, 2 Pick. 388; *Burgess v. Purvis*, 1 Burr. 326; *Ablett v. Skinner*, 1 Siderf. 229; *Davis' Lessee v. Whitesides*, 1 Bibb. 513; *Ward's Heirs v. Harrison*, 3 Bibb. 305; *Kellogg v. Kellogg*, 6 Barb. 181; *Gray v. Givens*, 26 Mo. 303; *McFadden v. Haley*, 2 Bay. 457; *Middleton v. Perry*, Id. 541; *Perry v. Walker*, Id. 461; *Boyleston v. Cordes*, 4 McCord, 144; *Stark v. Barrett*, 15 Cal. 371; *Touchard v. Crow*, 20 Cal. 162; *Smith v. Starkweather*, 5 Day, 209; *Baker v. Chastang*, 18 Ala. 417.

<sup>3</sup> *Robinson v. Roberts*, 31 Conn. 145; *Clark v. Vaughan*, 3 Conn. 193; *Phillips v. Medbury*, 7 Conn. 572; *Sharon v. Davidson*, 4 Nev. 419; *Collier v. Corbett*, 15 Cal. 185; *Clark v. Huber*, 20 Cal. 197; *Hart v. Robertson*, 21 Cal. 348; *Rowe v. Bacigalluppi*, 21 Cal. 635; *Hibbard v. Foster*, 24 Vt. 546. See also the authorities cited to sec. 344.

<sup>4</sup> *Treat v. Reilly*, 35 Cal. 131.

in this case, the counsel who insisted on this point were not without respectable authorities to sustain them. Thus, in an early case in Massachusetts, the Court said: "The demandant, upon production of her title, shows that she is coheir with five others: she will therefore have justice done to her, if she is allowed to recover an undivided sixth part. The tenant, being in possession, ought not to be disturbed, except by those who have the right. *Non constat* that the other coheirs are not as willing that the tenant should occupy the land, as that the demandant should."<sup>1</sup> So in Missouri, it is still maintained that "as the right of possession, which depends on title, is several, a recovery by one will restore him only a moiety of the disseizor, who will hold the other moiety with him in common."<sup>2</sup> A like doctrine is established in Pennsylvania.<sup>3</sup>

§ 344. **Actions of forcible entry and detainer may be brought by each tenant in common separately.** Thus, where L and B, tenants in common, were forcibly dispossessed, L alone brought his action, and the defendant insisted that B also should have been joined as plaintiff. But the Court said: "This objection cannot be sustained. Any one tenant in common may sue though his cotenants do not join in the action. And this may be done either in ejectment or in forcible entry and detainer. L had been put out of possession, and he might well maintain his action to regain it, without joining his cotenant B. Actions for personal property must be in the names of all the joint owners, but not so in real actions."<sup>4</sup> So, it is said, one coparcener or joint-tenant may, without joining his or her companion in interest, recover possession of the whole premises, in an action of forcible entry and detainer, against a stranger to the title; because, 1st: "The possession of one is the possession of both, in contemplation of law. Hence, a recovery in this form of action by one would enure to the benefit of both, and the pendency of the judgment might be pleaded to a

<sup>1</sup> Dewey v. Brown, 2 Pick. 387.

<sup>2</sup> Gray v. Givens, 26 Mo. 303.

<sup>3</sup> Dawson v. Mills, 32 Pa. St. 302.

<sup>4</sup> Turner v. Lumbrich, Meigs, 11; Allen v. Gibson, 4 Rand. 477.

proceeding of the other for the same cause.”<sup>1</sup> 2d, because: “The only question is whether plaintiff is entitled to possession as against the defendant; and as against all others than his companions, a joint-tenant, tenant in common, or coparcener, is entitled to the possession of the whole.”<sup>2</sup>

§ 345. **For Insurance.**—If two cotenants effect an insurance upon their common property in their joint names, “upon familiar principles, both the joint contractors should join in bringing an action for a breach of the contract, and the omission to join them is a good defence.”<sup>3</sup>

§ 346. **For Rents.**—“If two tenants in common make a lease of their tenements to another for terme of years, rendering to them a certaine rent yearely during the terme, if the rent be behind, &c., the tenants in common shall have an action of debt against the lessee, and not divers actions, for that the action is in the personalty.”<sup>4</sup> This rule is confined to a joint lease made by the tenants in common, in which there is a joint reservation of rent. “If there be separate reservations to each, then there must be separate actions.”<sup>5</sup> So if the original lease be made reserving an entire rent, and afterwards the lessee has notice to pay a moiety of the rent to each of the cotenants, and the rent is so paid and receipts given accordingly, it becomes “a question of fact, upon the whole evidence, whether the parties thereby meant to enter into a new contract, with a separate reservation of rent to each, or whether they meant to continue the old reservation of rent, each receiving his own moiety.”<sup>6</sup> Where a joint lease was made by two tenants in common, and a memorandum was annexed to the lease as a part thereof, stipulating that one-half of the rent reserved should be paid to each of the lessors, and all the covenants in the lease were to and with both lessors, the Court held that: “The effect of the memorandum was not to abrogate that covenant in the lease,” (*i. e.*

<sup>1</sup> *Rabe v. Fyler*, 10 Smedes & M. 446.

<sup>2</sup> *Allen v. Gibson*, 4 Rand. 477.

<sup>3</sup> *Tate v. Citizens' Mutual Fire Ins. Co.* 13 Gray, 81.

<sup>4</sup> Litt. sec. 316; *Wilkinson v. Hall*, 1 Bing. N. C. 717; *Decker v. Livingston*, 15 Johns. 482; *Sherman v. Ballou*, 8 Cow. 308.

<sup>5</sup> *Powis v. Smith*, 5 Barn. & Ald. 851; S. C. 1 Dowl. & R. 490; *Last v. Dinn*, 28 L. J. Ex. 94.

the covenant to pay rent,) “but only to regulate the mode of payment, and to prescribe the manner in which the lessee was to fulfil his covenant. Instead of performing his agreement, by a payment or tender of the whole rent to one of the joint lessors, as he might well do in the absence of a special agreement, he was required to pay a moiety to each. But this does not make the previous contract several, so as to change the remedy of the lessors for its breach into separate actions.

\* \* \* It is not to be overlooked that all the covenants in the lease are made to the plaintiffs jointly; that the demise itself is joint, and the remedy of expelling the lessee in case of non-payment of rent is also joint. It cannot be reasonably supposed that it was the intention of the parties, by the memorandum, to bind the lessors to pursue each a separate remedy for breach of one covenant in a lease, in which all the other cotenants were made to them jointly, and for breach of which they could pursue a joint remedy.”<sup>1</sup> “The owner of an undivided portion of a ground-rent may maintain a separate action of covenant for his proportion of rents in arrears.”<sup>2</sup> “Joint-tenants being seized *per mie* and *per tout*, and deriving by one and the same title, must sue jointly on their joint lease, and they must join in an action of debt or in an avowry for rent;”<sup>3</sup> and the same rule seems to be equally applicable to coparceners.<sup>4</sup> A tenant in common though, as against a stranger, entitled to the possession of the entire premises, cannot recover rents for more than his moiety.<sup>5</sup> If a reversion is severed by the death of the lessor and the consequent descent to his heir at law, the rent will thereby be apportioned, and each of the heirs may separately bring actions for his proportion.<sup>6</sup> “On the death of the lessor, the rent has to be apportioned among the heirs on whom the estate is cast. In all cases of apportionment of rent, it is the duty of the tenant to pay each party the proportion of rent to which he is entitled. This liability of the tenant forms an exception to the

<sup>1</sup> Wall v. Hinds, 4 Gray, 268.

<sup>2</sup> Cook v. Brightly, 46 Pa. St. 445. See also Hennecker v. Turner, 4 Barn. & C. 157; Martin v. Crompe, 1 Ld. Raym. 340.

<sup>3</sup> Barbour on Parties, 80.

<sup>4</sup> Decharms v. Horwood, 4 Moore & Scott, 400.

<sup>5</sup> Muller v. Boggs, 25 Cal. 175.

<sup>6</sup> Cole v. Patterson, 25 Wend. 457; Reed v. Ward, 22 Penn. St. 149.



rule that an entire contract cannot be apportioned, and that a debtor cannot be compelled to pay a single demand in parcels to several persons. The exception had its origin in reasons of policy and convenience, and has been long and firmly established. It is in the power of the tenant to avoid several suits and distresses, by the prompt payment of the rent as it falls due."<sup>1</sup> The authorities also generally concur in asserting that the apportionment of rent may be affected by a grant or devise of the reversion to two or more, as well as by descent to several heirs.<sup>2</sup>

§ 347. **Trespass.**—The general rule of the common law that tenants in common must join in personal actions, when applied to actions of trespass, requires that all the cotenants must join if all were at the time of the alleged trespass entitled to the immediate possession of the property upon which it was committed. Generally, but not uniformly, this rule of the common law is still regarded as controlling actions of trespass. "That tenants in common must join in the action of trespass, *quare clausum fregit*, is well settled. There is nothing in our practice to require a departure from the rule of the common law, but there is great reason to adhere to it, to prevent multiplicity of suits, and the inconvenience that would arise from the bringing of several suits and allowing several recoveries for the same trespass."<sup>3</sup> This rule of the common law has not been altered by the Code in New York.<sup>4</sup> Where the owner of land made an agreement with another person under which the latter was to raise a crop on the lands of the former, and the crop, when raised, was to be divided between the two, it was held that as the two thereby became tenants in common of the crop, they should join in an action of trespass against a third person for cutting and

<sup>1</sup> *Crosby v. Loop*, 13 Ill. 627; *Jones v. Felch*, 3 Bosw. 64; *Cruger v. McClaughry*, 51 Barb. 644; *Ards v. Watkin*, Cro. Eliz. 637, 651; *Eyerson v. Quackenbush*, 2 Dutch. 250; *Farley v. Craig*, 6 Halst. 273; *Rivis v. Watson*, 5 Mees. & W. 255.

<sup>2</sup> *Cole v. Patterson*, 25 Wend. 457; *Reed v. Ward*, 22 Penn. St. 149. Same authorities as note 1.

<sup>3</sup> *May v. Slade*, 24 Tex. 208; *Austin v. Hall*, 13 Johns. 287; *Winters v. McGhee*, 3 Sneed, 128; *Selwyn's Nisi Prius*, 13th ed. 1248; Com. Dig. Abatement (E 10); *May v. Parker*, 12 Pick. 39.

<sup>4</sup> *De Puy v. Strong*, 37 N. Y. 373; S. C. 4 Abb. Pr. N. S. 344.



carrying it away.<sup>1</sup> And where mills were worked on the shares, the owner and occupant, it was thought, should be considered *quasi* tenants in common of the mills as well as of the profits. They were therefore, as such cotenants, entitled to join in an action for injury sustained from the withholding of water from the mills.<sup>2</sup> But where one of the cotenants is in exclusive possession of the property by virtue of a contract of sale with his cotenants, by which contract he is entitled to be and remain in such exclusive possession, he is entitled to maintain in his own name actions of trespass for injuries to such property.<sup>3</sup> Without any permanent severance of their right to possession, and without any change in their title, cotenants may, for purposes of convenience and to avoid any conflict of interests, agree each to exclusively occupy a specific part of the common lands. Pending an occupancy taken and held under such an agreement, a trespass may be committed on some part of the lands, and may, as when it consists of the cutting of trees, result in damages not confined to the occupant of the part trespassed upon, but equally affecting all the cotenants. In such case, the question arises, can an action of trespass be sustained by all the part owners, or must it be prosecuted by the one then entitled to the possession of the lands trespassed upon? The answer which has been made to this question is that so long as an exclusive possession of any part of the lands of the cotenancy is maintained only for purposes of mutual convenience, and is not so hostile to the title of the other cotenants as that, if continued, it could ripen into title in severalty by disseizin, all the cotenants may join. While the parties intend no severance of their cotenancy, "it is not for the defendant, who is a stranger to the title, to give to that matter a legal effect which was never intended by the parties in interest."<sup>4</sup>

§ 348. In actions of trespass to try titles, the rule in

<sup>1</sup> Foote v. Colvin, 3 Johns. 216; Moulton v. Robinson, and Ladd v. Robinson, 27 N. H. (7 Foster) 563; Hatch v. Hart, 40 N. H. 97.

<sup>2</sup> Rich v. Penfield, 1 Wend. 380.

<sup>3</sup> Sparks v. Leavy, 1 Robt. 530. So where a tenant in common of a crop abandons and relinquishes all his interest, the other cotenant, if he have exclusive possession, may sustain an action against a trespasser. Hatch v. Hart, 40 N. H. 97.

<sup>4</sup> Johnson v. Goodwin, 27 Vt. 291.

regard to the joinder of plaintiffs is the same as in ejectment, viz., each tenant in common may maintain a separate action for his interest.<sup>1</sup>

§ 349. In trover, according to the rules of the common law, all the cotenants must join,<sup>2</sup> in actions against third persons, unless some circumstance appears by force of which the case is excepted from the general rule. Cotenants are exempted from the operation of this rule whenever something has occurred by reason of which one or more of their number can no longer sustain any action. Thus, if one of them has previously brought an action, and the non-joinder of his companions in interest being waived, the action was tried upon the merits and resulted in a judgment for the defendant, here, as the plaintiff by the principles of *res judicata* is forever precluded from prosecuting any further proceedings based upon the same alleged conversion, his cotenants must be permitted to bring suit without joining him.<sup>3</sup> And so where one cotenant has sued, and has, by failure of defendant to object to the non-joinder of the others, recovered judgment, and can therefore maintain no further action for the original conversion, the others may sue without him.<sup>4</sup> But there are American cases directly in conflict with the general rule of the common law, and which affirm the right of each cotenant to bring a separate action against a third person who has converted any of the personal property of the cotenancy.<sup>5</sup>

§ 350. Waste.—From the general rule of law that tenants in common must join in personal but never in real actions, it follows that “real actions of waste to recover the place wasted must therefore be brought by them separately, but in a personal action in the nature of waste they must all join.”<sup>6</sup>

<sup>1</sup> *Hines v. Trantham*, 27 Ala. 361; *Croft v. Rains*, 10 Tex. 520; *Hooper v. Hall*, 30 Tex. 154; *Presley v. Holmes* 33 Tex. 476.

<sup>2</sup> *Gilmore v. Wilbur*, 12 Pick. 124; *Haskell v. Jones*, 24 Me. 223; *Wheelwright v. Depeyster*, 1 Johns. 471; *Putnam v. Wise*, 1 Hill, 234; *Hall v. Page*, 4 Geo. 434; *Starnes v. Quinn*, 6 Geo. 87.

<sup>3</sup> *Brizendine v. Frankfort B. Co.*, 2 B. Monr. 83.

<sup>4</sup> *Sedgworth v. Overend*, 7 T. R. 279; *Starnes v. Quinn*, 6 Geo. 87.

<sup>5</sup> *Shamburg v. Moorehead*, 4 Brewster, 92; *Boobier v. Boobier*, 39 Me. 409; *Howard v. Snelling*, 28 Ga. 473.

<sup>6</sup> *Bullock v. Hayward*, 10 Allen, 460. See *Greenly v. Hall's Exr.* 3 Harr. Del. 9.

A statute authorizing a person entitled to an action of waste to bring an action of tort in the nature of waste, does not change the common law rule as to joinder, by authorizing a several suit on the part of each cotenant.

§ 351. **Nuisance.**—"Where several persons have a joint interest in property injured by a nuisance, they ought all to be made plaintiffs in an action for the injury. Tenants in common, also, should join in an action for a nuisance done to their land."<sup>1</sup> So, "two or more persons having separate and distinct tenements which are injured or rendered uninhabitable by a common nuisance, or which are rendered less valuable by a private nuisance which is a common injury to the tenements of both, may join in a suit to restrain such nuisance."<sup>2</sup> Tenants in common must join in actions for injuries sustained by reason of the flowing of their lands.<sup>3</sup>

§ 352. **Assessment of Damages.**—The general rule of law that tenants in common, as well as other cotenants, must join in personal actions, is applicable to proceedings to obtain compensation for damages occasioned, or about to be occasioned, to the common lands by the location of a railroad or other public highway. "The assessment of damages must be joint, and cannot be severed by the jury."<sup>4</sup>

§ 353. **Failure to Object to Non-Joinder of a Cotenant.**—We have shown that in real actions cotenants must join or sever according to the nature of their cotenancy; and that in personal actions they must join irrespective of the character of the cotenancy. But whatever we have said in regard to the necessity of their joinder has been based upon the hypothesis that the non-joinder was objected to by the defendant, and that the objection was available under the pleadings at the time it was sought to be interposed. We shall now consider the question as to the manner in which the objection must be made. The rule of law upon this subject, best sustained by

<sup>1</sup> Addison on Torts, 67, 196; Roscoe on Real Actions, 372; *Daniels v. Daniels*, 7 Mass. 135; *Parke v. Kilham*, 8 Cal. 79.

<sup>2</sup> Barbour on Parties, 348.

<sup>3</sup> *Tucker v. Campbell*, 36 Me. 346.

<sup>4</sup> *Merrill v. Inhabitants of Berkshire*, 11 Pick. 274; *Railroad Co. v. Bucher*, 7 Watts, 33; *Dwight v. County Commissioners*, 7 Cush. 534.

the authorities both English and American, is this, that although the form of action be such that all the cotenants ought to join, yet if the action be for conversion of, or injuries to the common property, and if one "sue alone, and the defendant, instead of pleading the non-joinder in abatement, plead to the action, the plaintiff will recover for his share of the damages."<sup>1</sup> If the defendant neglects to interpose his plea in abatement, the only purpose for which he can introduce evidence of the cotenancy, is that of having the damages awarded to the plaintiff reduced so as to correspond with his actual interest in the subject-matter out of which the cause of action has grown.<sup>2</sup> Cotenants "may sue severally for their aliquot shares or proportions of interest in chattels; subject, however, to be defeated in the latter case by a plea in abatement for the non-joinder of their cotenants. And if, in the latter case, the defendant fails to plead in abatement, he cannot give the non-joinder in evidence, on the general issue, or plead it in bar, or move in arrest, even though the matter be found specially, or appear on the face of the plaintiff's pleadings. If the plaintiff sue separately, and the defendant fails to plead, the plaintiff may proceed and have his recovery for his aliquot interest in the property, and the defendant is confined to giving in evidence the joint interest of others, in mitigation of damages."<sup>3</sup> "It appears to be well settled in the books, that in actions of trover and trespass, the plaintiff may sue separately for his aliquot share or proportion of interest in a chattel, and that the defendant may give the joint interest of others in evidence, in mitigation of damages, but that he cannot avail himself of the omission of the plaintiff to unite the other tenants in common with him in the suit, otherwise than by pleading it in abatement."<sup>4</sup>

<sup>1</sup> *Webber v. Merrill*, 34 N. H. 208; *Brown v. Hedges*, 1 Salk. 290; *Blackborough v. Graves*, 1 Mod. 102; *Addison v. Overend*, 6 T. R. 770; *Dockwray v. Dickinson*, Skinner, 640; *Sedgworth v. Overend*, 7 T. R. 279; *Lothrop v. Arnold*, 25 Me. 140; *Frazier v. Spear*, 2 Bibb. 385; *Hobbs v. Hatch*, 48 Me. 55; *Converse v. Symmes*, 10 Mass. 378; *Thompson v. Hoskins*, 11 Mass. 419; *Phillips v. Cummings*, 11 Cush. 469; *Bloxam v. Hubbard*, 5 East, 420.

<sup>2</sup> *Holmes v. Sprowl*, 81 Me. 76; *Rolette v. Parker*, Breese, 275; *Tripp v. Riley*, 15 Barb. 333; *Branch v. Doane*, 17 Conn. 415; *Jones v. Lowell*, 85 Me. 540; *Cabell v. Vaughan*, 1 Saund. 291 f.

<sup>3</sup> *Starnes v. Quinn*, 6 Geo. 86.

<sup>4</sup> *Wheelwright v. Depeyster*, 1 Johns. 486.

§ 354. **Failure to Object to Non-Joinder in Actions on Contracts.**—The necessity of a plea in abatement does not exist in actions upon joint contracts. “When a contract is made with two or more persons, and one only sues, the defendant may have the advantage on the general issue without pleading it, *à fortiori*, if it appears from the plaintiff’s own showing that the contract was made with himself and others not named, nor any legal reason assigned for not naming them; because it appears that no such contract was made with the plaintiff as he has declared on.”<sup>1</sup> It seems to be well established that it is not only unnecessary to plead in abatement when there is a non-joinder of plaintiffs, but, further, that such plea is improper. “The want of the proper plaintiffs in actions on contract is an exception to the merits, and is to be taken advantage of, either on demurrer, in bar, or on the general issue, but not by plea in abatement.”<sup>2</sup> “In all cases of contracts, if it appear upon the face of the pleadings that there are other obligees, covenantees, or parties to the contract, who ought to be but are not joined as plaintiffs in the action, it is fatal on demurrer, or on motion in arrest of judgment, or on error; and though the objection may not appear on the face of the pleadings, the defendant may avail himself of it, either by *plea in abatement*, or as a ground of nonsuit on the trial, as a variance upon *non est factum*, if the action be upon a specialty, or if it be upon any other contract, upon the plea of the general issue.”<sup>3</sup>

§ 355. **Detinue and Replevin.**—In respect to actions of replevin, doubt exists as to whether the non-joinder of a co-tenant should be objected to by plea in abatement, or whether, as in actions on contracts, the non-joinder is available without such plea. The opinion on one side was thus expressed by Chief Justice Parsons, in an early Massachusetts case decided by him: “In this action, this irregularity is not pleaded in abatement or in bar, but it appears from the plaintiff’s own showing in the writ, in which he claims an undivided moiety of the chattels said to be unjustly taken

<sup>1</sup> Hart v. Fitzgerald, 2 Mass. 510.      <sup>2</sup> Baker v. Jewell, 6 Mass. 462.

<sup>3</sup> Chitty s Pl. 13.

and detained; and it is a question whether the defendant can take advantage of this defect thus appearing, or whether he must have pleaded it in abatement. If there is an analogy in the principles of law regulating the forms of actions for injuries to chattels, and of actions of replevin, it would seem that the defendant should have pleaded in abatement that there was another part owner not named, in order to have the advantage of the omission. But is there such an analogy? In trespass or case for injury done to a chattel, each part owner in fact is injured, and the damages, if not severed by the form of the action, must be divided among the plaintiffs after recovery. In these actions, also, there are cases in which one part owner may legally sue alone, without joining his partners. In replevin which is founded on property, the chattel is to be delivered to the plaintiff, as well as damages to be recovered. This chattel is not capable in law of severance, and the whole or none of it can be delivered to the plaintiff; and if it be delivered to the plaintiff being but a part owner, he must receive an undivided part, in which he claims no property. In replevin, also, we do not recollect any case in which a part owner can sue for his undivided part only. If property in him and another be pleaded in abatement, such plea cannot be confessed and avoided by any matter which the plaintiff can reply to it. These are very strong distinctions between the principles applying to actions of trespass and of the case for an injury done to chattels, in which damages only are demanded, and actions of replevin, in which the property said to be unjustly taken and detained is to be delivered to the plaintiff. We therefore think that the general rule of law must govern, that when a substantial defect in the writ appears on the record, the Court ought, *ex officio*, to abate it.”<sup>1</sup> It appears from the foregoing extract that in the case then before the Court the fact that the plaintiff was a part owner only was apparent from an inspection of the writ; but the language of the Court, and the reasoning upon which the Court based its decision, both, as it seems to us, tend to establish the proposition that in replevin, as in assumpsit, the non-joinder of a cotenant is available to the

<sup>1</sup> Hart v. Fitzgerald, 2 Mass. 511.

defendant without a plea in abatement, even when such non-joinder is not evident from an inspection of the writ. There are other cases which favor the same proposition, and indicate that, under the plea of *non cepit*, the plaintiff must show that he has an exclusive right to the possession of the property.<sup>1</sup> But, on the other hand, Judge Story was clearly of the opinion that when the plaintiff sues for the whole and not for his moiety, the non-joinder of the plaintiff's cotenant "is pleadable in abatement only, and is not a plea to the merits; and that pleading over to the merits is a waiver of it."<sup>2</sup> It is self-evident that in reference to the point now under consideration the rule of law must be the same in replevin as in detinue. In considering the last named action, the Supreme Court of North Carolina, after referring to the rule applicable to actions *ex delicto* for the recovery of damages, said: "It is otherwise in the action of 'detinue.' Treating it as an action *ex contractu*, it falls under a well settled general rule, and treating it as an action *ex delicto*, we think it cannot be maintained by one of several tenants in common, and the objection may be taken advantage of, upon the general issue, or by demurrer, or motion in arrest; for in detinue the specific thing is recovered which is not *divisible*; so the plaintiff cannot recover his aliquot part, and if allowed to recover at all, must get the whole, which would be more than he is entitled to."<sup>3</sup>

§ 356. **Whether one can Recover the whole Damages.**—We have seen that, under the general issue, the defendant may show that the plaintiff owns but an undivided interest, and upon making such showing, may have the damages apportioned so as to correspond with that interest. Well as this general rule is established, there are cases in which it has been sought to create exceptions to the rule; and in some of these cases, some very novel propositions have been assumed to be familiar and long established. One of these cases had direct reference to actions of trespass *quare clausum fregit*, and in the course of the opinion of the Court, an illustration

<sup>1</sup> Reinheimer v. Hemingway, 85 Pa. St. 498.

<sup>2</sup> D'Wolf v. Harris, 4 Mason, 539.

<sup>3</sup> Cain v. Wright, 5 Jones Law, 283.



was drawn from what was supposed to be the law governing the recovery in an action for mesne profits. The case referred to was an action for breaking and entering the plaintiff's close. The plea was the general issue. On the trial, the plaintiff was shown to be the owner of a moiety of the lands on which the alleged trespass was made. The Court felt no hesitation in permitting the plaintiff to recover the whole damages, and justified its decision as follows: "Having title to one-half, the plaintiff must recover the whole land in ejectment, and the whole damage, we think, in trespass *quare clausum fregit*. That was certainly so at common law, when trespass is brought merely for mesne profits, and equally in an action of ejectment, the plaintiff, who recovered the land, would recover damages for his own portion of the land, and also for his cotenant. The case of *Chandler v. Spear*<sup>1</sup> was trespass *de bonis*, and in that action, which is merely personal, one tenant in common can only recover his portion of the common chattel, and the same rule was thought applicable when the action was in that *form*, notwithstanding the damage grew out of an injury to the land. But we are not aware that any question has ever been made, but that in real and possessory actions, one tenant in common may always recover the damage due his cotenant as against a mere stranger."<sup>2</sup>

§ 357. **Failure to Object to Non-Joinder of Joint-Tenant.**—The general rule of law that the failure to plead the non-joinder of plaintiff's cotenant does not preclude the defendant from giving evidence of the cotenancy for the purpose of procuring an apportionment of the damages, has been held to be inapplicable to joint-tenants. "In the case of tenants in common, the rule allowing the interest of the party not joined to be proved in diminution of damages, is put upon the ground that he may still sue for the value of his share. But joint-tenants are not the owners of separate shares. Each joint-owner has title to the entirety. I am, therefore, of opinion that where the defendant permits one or more of several joint-tenants to sue alone in action of tort, by not

<sup>1</sup> 22 Vt. 388.

<sup>2</sup> *Hibbard v. Foster*, 24 Vt. 546.



pleading the joint-tenancy in abatement, that the recovery should be for the damages sustained by all the cotenants."<sup>1</sup>

§ 358. **The failure to interpose a plea in abatement** when sued by one part owner is a waiver of the right to such plea in a subsequent action brought by the other part owner for the same cause and against the same defendant. The plaintiff in the first action having recovered therein on his part of the demand can no longer sustain any further action thereon, either separately or in conjunction with his former companions in interest. In order that the part owner who has not as yet obtained redress may have some remedy, it is necessary that he should be permitted to sue alone. If the defendant wishes to avoid the costs and annoyance of several suits, he must interpose his objection at the earliest opportunity.<sup>2</sup>

§ 359. **Joinder with Strangers to the Cotenancy.**—An action may be prosecuted by two or more persons as cotenants, and upon the trial it may appear that one of them is not a cotenant—has no interest in the property—and is therefore a superfluous party. In such case, it is clear upon the authorities that judgment must be entered for the defendant. It makes no difference that the other plaintiffs have a perfect cause of action—one upon which, had they sued alone, they must have recovered against the defendant. "It is an established principle that only those whose legal rights are invaded should unite in an action for the injury."<sup>3</sup> Therefore, if an action of detinue be brought by several heirs, and it appears on the trial that one of them was divested of his interest before the suit was brought, judgment must be entered for the defendant.<sup>4</sup> So, when two or more persons unite as petitioners in a bill in equity, if either of them is not entitled to relief, the bill must be dismissed as to all.<sup>5</sup> If several join

<sup>1</sup> *Zabrisbie v. Smith*, 13 N. Y. 337.

<sup>2</sup> *Sedgeworth v. Overend*, 7 T. R. 279; *Starnes v. Quinn*, 6 Geo. 86.

<sup>3</sup> *Lewis v. Knight*, 3 Litt. 225; *Ulmer v. Cunningham*, 2 Greenl. 117; *Co. Litt.* 145b; *Glover v. Hunnewell*, 6 Pick. 224; *Rhoads v. Booth*, 14 Iowa, 576; *Barratt v. Collins*, 10 J. B. Moore, 446.

<sup>4</sup> *Lewis v. Knight*, 3 Litt. 225.

<sup>5</sup> *Jones v. Quinnipiack Bank*, 29 Conn. 45.

in an action of trover, "it is incumbent upon them to prove the property in *all*, not a part only, of the plaintiffs. And it makes no difference in what manner the title of one fails, whether in consequence of no conveyance from the owner, or of a conveyance void by reason of fraud. If all the plaintiffs have not an interest in the goods, they fail to establish a material allegation in their declaration that they were possessed of them as *their own* property."<sup>1</sup> So, if in any form of action it appear that all the plaintiffs once had a good cause of action, and that some of them are barred by the statute of limitations, while others, from having labored under some disability, are not so barred, those who were under the disability cannot recover, but judgment must be entered in favor of the defendant.<sup>2</sup> "It is well settled that on a joint demise of two or more plaintiffs, if any of them fail to show title on the day of the demise, the plaintiffs cannot recover."<sup>3</sup> In ejectment, "it is admitted that, if any one of the plaintiffs has no title to the land in question, though the other plaintiffs may have the whole title, no recovery can be had. To entitle the plaintiffs to a verdict, all the plaintiffs must have a right to demand the possession."<sup>4</sup> "If one who has a good cause of action join, in trespass *quare clausum fregit*, with one who has no cause of action, the suit cannot be sustained."<sup>5</sup> The rule that all the plaintiffs must have a right of recovery or else the action will entirely fail, is applicable where the plaintiffs are husband and wife.<sup>6</sup> If a personal injury be done to two or more persons, a joint cause of action does not accrue to them, although the injury to each may result from the same act.<sup>7</sup> An early statute in Connecticut authorized an action to be brought by a defendant against the plaintiff for bringing a suit with intent "unjustly to trouble and vex such defendant." It was

<sup>1</sup> *Pettibone v. Phelps*, 13 Conn. 449; *Gerry v. Gerry*, 11 Gray, 381.

<sup>2</sup> *Sanford v. Button*, 4 Day, 312; *Hardeman v. Sims*, 8 Ala. 747; *Dickey v. Armstrong's Devises*, 1 A. K. Marsh. 41.

<sup>3</sup> *Skyles' Heirs v. King's Heirs*, 2 A. K. Marsh. 387.

<sup>4</sup> *DeMill v. Lockwood*, 3 Blatchf. 61; *Torney v. Pierce*, 42 Cal. 338; *Cheney v. Cheney*, 26 Vt. 606; *Jackson v. Richmond*, 4 Johns. 483.

<sup>5</sup> *May v. Slade*, 24 Tex. 208; *Murray v. Webster*, 5 N. H. 392.

<sup>6</sup> *Moore v. Carter*, Hempst. 64; *Rawlins v. Rounds*, 27 Vt. 17; *Van Arsdale v. Dixon, Hill & Denio*, 358; *Gerry v. Gerry*, 11 Gray, 381.

<sup>7</sup> *Leavet v. Sherman*, 1 Root, 159.

held that three persons who had been parties defendant in the same suit could not join in an action under this statute, because such action was "not for a joint wrong, or an injury to joint property, or the violation of a joint right, but for separate personal wrongs to each, for which the law will not sustain a joint action."<sup>1</sup>

§ 360. **Misjoinder, how taken advantage of.**—In regard to the non-joinder of cotenants, in actions arising out of their common property, and the manner in which defendant should take advantage of such non-joinder, we have seen that a distinction has been made between actions sounding in tort and those based upon contract; and also that some of the authorities make a further distinction between different forms of actions *ex delicto*, contending that while, if the action be for damages, the non-joinder must be pleaded in abatement, and if it be for the recovery of possession of chattels alleged to be wrongfully withheld from the plaintiff, then the non-joinder is available without such plea. Concerning the misjoinder of persons as cotenants when they have no interest in the subject-matter in controversy, no such distinctions have ever been made; and the same rule which applies to actions *ex contractu*, is equally applicable to actions *ex delicto*. The objection that one of the plaintiffs has no interest in the cause of action "may be taken on the trial in arrest, or by appeal, or writ of error, and especially when such misjoinder of parties does not appear from the plaintiff's petition. The counts of a petition may be ever so perfect in showing a just right, or that there is a proper joinder of parties, and yet if, upon the trial, or in any stage of the case the misjoinder appears, defendant may avail himself of the defect."<sup>2</sup> "The rule of the common law was that the objection, if it appear on the record, may be taken advantage of by demurrer, in arrest of judgment, or a writ of error; or if the objection do not appear on the face of the proceedings, it would be a ground of nonsuit on the trial."<sup>3</sup> "If *too many* persons be made coplaintiffs, the objection, if it appear on the record, may be taken advan-

<sup>1</sup> Ainsworth v. Allen, Kirby, 146.

<sup>2</sup> Rhoads v. Booth, 14 Iowa, 577; Gerry v. Gerry, 11 Gray, 331; Ulmer v. Cunningham, 2 Greenl. 118.

<sup>3</sup> Gillam v. Sigman. 29 Cal. 639.

tage of either by demurrer, in arrest of judgment, or by writ of error; or if the objection do not appear on the face of the pleadings, it would be a ground of nonsuit on the trial."<sup>1</sup>

§ 361. **Misjoinder—Rule under the Codes.**—The rule of the common law under which the defendant was permitted to object to the misjoinder of parties plaintiff whenever the same was made to appear, and was relieved from the necessity of interposing a plea in abatement, has been abolished by the Codes of New York and of California. In each of these States the misjoinder of plaintiffs, if apparent upon the face of the complaint, must be taken advantage of by demurrer; if not apparent upon the face of the complaint, the defendant must set it up in his answer. The failure to demur in the one case, and the failure to object to the misjoinder in the answer in the other, are each alike an irrevocable waiver of the defendant's right to take advantage of the misjoinder.<sup>2</sup> The same Codes also contain similar provisions specifying the manner in which the defendant may object to the want of proper parties plaintiff. Under these Codes, "a defect of parties when apparent upon the face of the complaint, is good ground for demurrer; and when not apparent upon the face of the complaint, may be taken by answer, and if not taken either by demurrer or answer, the defendant shall be deemed to have waived the same."<sup>3</sup> It has also been held that the objection must be made at the earliest opportunity; and therefore that if the non-joinder be apparent on the face of the complaint, the defendant by not demurring on that ground, waives his rights, and cannot *in his answer* take advantage of the non-joinder.<sup>4</sup>

§ 362. **Death of one Cotenant before Suit.**—When the cause of action is joint, it survives to the remaining cotenants on the death of either of them. This is true in every form of cotenancy. "It is to be observed that where dam-

<sup>1</sup> 1 Chitty Pl. 66.

<sup>2</sup> *Fosgate v. Herkimer Manf. Co.* 12 N. Y. 584; *Gillam v. Sigman*, 29 Cal. 639; *Hastings v. Stark*, 36 Cal. 126.

<sup>3</sup> *Alvarez v. Brannan*, 7 Cal. 510; *Dunn v. Tozer*, 10 Cal. 170; *Wendt v. Ross*, 33 Cal. 656; *Scranton v. F. & M. Bank*, 33 Barb. 527; *Conklin v. Barton*, 43 Barb. 435; *Merritt v. Walsh*, 32 N. Y. 685.

<sup>4</sup> *Zabriskie v. Smith*, 13 N. Y. 336.

ages are to be recovered for a wrong done to tenants in common, or parceners in a personall action, and one of them die, the survivor of them shall have the action; for albeit the property or estate be severall between them, yet (as it appeareth here by Littleton) the personal action is joynt."<sup>1</sup> "When one or more of several obligees, covenantees, or others having a *joint legal* interest in the contract, dies, the action must be brought in the name of the survivor, and the executor or administrator of the deceased cannot be joined, nor can he sue separately, though the deceased alone might be entitled to the *beneficial* interest in the contract."<sup>2</sup> "When one of several parties jointly interested in the property at the time the injury was committed is dead, the action should be in the name of the survivor, and the executor or administrator of the deceased cannot be joined, nor can he sue separately; and therefore to an action of trover brought by the survivor of three partners in trade, it cannot be objected that the two deceased partners and the plaintiff were joint merchants, and that in respect of the *lex mercatoria* the right of survivorship did not exist, for the *legal* right of action survives, though the beneficial interest may not."<sup>3</sup> As tenants in common ought to join in all personal actions, it follows, according to the principles stated in the above quotations, that upon the death of either, the cause of action which was before in the cotenants jointly passed to the survivor, and may be by him prosecuted to judgment. Therefore, if a deed be made to two with a covenant of warranty, and the grantees are "evicted in their lifetime, the action is well brought by the survivor."<sup>4</sup> So, if there be two cotenants of a patent right, and damages be suffered by them from an infringement of such right, the survivor of them may recover the entire amount of such damages.<sup>5</sup> The same rule is applicable to actions for the recovery of indivisible chattels. Thus, where an action of detinue was brought by a sole plaintiff for a slave alleged to have been devised to himself and his brother,

<sup>1</sup> Co. Litt. 198 a; 3 Rob. Pr. 164.

<sup>2</sup> 1 Chitty Pl. 19; Addison on Contracts, 1048.

<sup>3</sup> 1 Chitty Pl. 67.

<sup>4</sup> Townsend v. Morris, 6 Cow. 127; Codman v. Hall, 9 Allen, 337.

<sup>5</sup> Smith v. London & N. W. R. W. Co., 2 El. & Bl. 69.

and the brother was alleged to have died prior to the suit, the defendant objected that the plaintiff was "incapable of maintaining a suit alone for the entirety of the thing devised;" but the Court overruled the objection, because "in suits for an indivisible thing, a right of action survives to a tenant in common; and this, from the necessity of the case, as we conceive the authorities sufficiently maintain."<sup>1</sup> "In actions *ex delicto*, in case of the decease of the sole plaintiff, not only did the suit abate, but the right was forever gone. Not so in the case of the decease of two or more plaintiffs: the suit abated, but the right survived. It is a general rule that where two are entitled to a right *ex delicto*, and one dies, it remains wholly to the survivor."<sup>2</sup>

§ 363. **Death of all Cotenants before Suit.**—Upon the death of one of the parties entitled to a joint action, the whole right of action not only accrues to the survivor during his lifetime, but if not prosecuted to judgment by him, vests, at his death, in his executor or administrator. The executor of the party first deceased need not, in fact he must not, join as coplaintiff with the executor of the last survivor. If the two join, the case is as clearly a misjoinder of parties plaintiff as if the testator of one of them never had any interest in the cause of action.<sup>3</sup>

§ 364. **Death of a Cotenant pendente lite.**—In the two preceding sections, we have considered the effect of the death of one cotenant after the accruing of a joint cause of action and *before* the commencement of a suit thereon; and have found the rule to be universal that all joint causes of action survive to the last survivor, irrespective of the nature of the cotenancy; and further, that when the cause of action survives after the decease of all the cotenants, it vests in the personal representative of the last survivor. We shall now consider the effect of the death of one of the cotenants *pendente lite*, for the purpose of ascertaining whether such death operates as an abatement of the suit. The general rule upon

<sup>1</sup> *Shelby v. Guy*, 11 Wheat. 365.

<sup>2</sup> *Wright v. Eldred*, 2 Chip. 41.

<sup>3</sup> *Stowell's Admr. v. Drake*, 3 Zab. 310; 1 Chitty Pl. 21.

this subject is thus stated by Mr. Jickling: "If the whole interest of a party dying survive to the other party, so that no claim can be made by or against the representatives of the party so dying, the proceedings do not abate. Survivorship is a characteristic of joint-tenancy, and hence, on the death of a joint-tenant, party to a suit, either as plaintiff or defendant, the suit does not abate."<sup>1</sup> It is therefore certain that if the plaintiffs are joint-tenants, the death of one does not occasion an abatement of the action.<sup>2</sup> But the rule of law preventing the abatement of a suit upon the decease of either plaintiff therein, is the result of statutory enactment. "At the common law in all actions, where there are two or more plaintiffs or demandants, the death of one of them pending the suit, that is, before final judgment, is an abatement of the action, though the property survives to the other, except in a few cases, such as a *quare impedit* by two, where, out of necessity, the death of one does not abate the suit, for the six months may pass, or a lapse incur, before the survivor can bring another action, and therefore if the writ abates the action will fail; or in an *audita querela* by two, for it is only in discharge; or in debt by two executors, where one was summoned and severed, and dies, the writ does not abate."<sup>3</sup> By statute 8 and 9 W. 3. c. 11, sec. 7, it was enacted "that if there be two or more plaintiffs or defendants, and one or more of them should die, if the cause of such action shall survive to the surviving plaintiff or plaintiffs, or against the surviving defendant or defendants, the writ or action shall not be thereby abated; but such death being suggested on the record, the action shall proceed at the suit of the surviving plaintiff or plaintiffs against the surviving defendant or defendants."<sup>4</sup>

§ 365. **Survivorship of Actions, not affected by Statute.**—A statute of Arkansas declared that "all survivorships of real and personal estate are forever abolished." Subsequently to the enactment of this statute, a surviving obligee of a bond

<sup>1</sup> Analogy between Legal and Equitable Estates, 244.

<sup>2</sup> *Fallowes v. Williamson*, 11 Ves. 306; *Boddy v. Kent*, 1 Mer. 364.

<sup>3</sup> 2 Saunders, 72 i.

<sup>4</sup> The practice as designated by this statute was followed in *Anderson v. Knight*, Geo. Decis., part 2, p. 123.



brought an action as such survivor against the obligor in the bond, and was met by the objection that this statute had abolished survivorship in joint causes of action, and therefore that the plaintiff could not alone maintain an action on the bond. The Court, in order to reach a proper construction of the statute, referred to the old law, and the mischief therein which the act was intended to avert; and concluded from such reference, that the only object of the statute was to abolish that incident of joint estates under which both the legal and the beneficial title vested in the longest liver; and that "the general words of the act must be taken in a qualified sense; for, unless that be done, they will defeat the very object and intention of the statute. Instead of remedying the evil, it would operate to produce the very mischief intended to be cured. It would operate to the prejudice of trade and commerce, by incumbering the remedies by which rights would be asserted. Such a construction put upon the act would be in direct derogation of all the principles of commerce which are now so firmly and beneficially established among all civilized nations. And men, instead of being encouraged to join their means and efforts together, for important objects and ends, for trade and other purposes, would stand aloof from each other, if, upon the decease of one partner, the other had no right to wind up the business. We think this principle, so completely and intimately blended as it is in our commercial relations, too plain to require further illustration or argument."<sup>1</sup>

§ 366. **Joinder of Actions against Cotenants.**—The actions which may be brought against cotenants based upon the mere fact of their ownership of the common property are but few in number. Persons occupying toward each other the relation of cotenants frequently make joint contracts with strangers to the cotenancy, and they are sometimes guilty of jointly committing torts against such strangers, but in these cases the liability of the cotenants is based, in the first instance, on their joint contract, and in the second, on their joint act; and in both cases the liability in nowise results from the subject-matter of the cotenancy; and is therefore, through-

<sup>1</sup> Trammell v. Harrell, 4 Pike, 605.



out, regulated and to be enforced by precisely the same rules of law as though the contractors on one hand and the tort-feasors on the other, instead of being cotenants, had between one another no property relations whatever. But damages may be suffered by strangers to the cotenancy, and which, though not occasioned by the *act* of any of the cotenants, may nevertheless confer a right of action on the person damaged. In the case of a tort committed by the concurrent act of two or more persons, it is well understood that the liability of the tort-feasors is both joint and several. But for injuries occasioned by property and chargeable to the negligence or non-feasance of the owners thereof disconnected from any affirmative act done or caused by them, the consequent liability is joint, and all the cotenants must be made defendants in an action based upon such liability, for their title comes in question as the foundation of the claim.<sup>1</sup> "If one tenant in common only be sued in trespass, trover, or case, for anything respecting the land, he may plead the tenancy in common in abatement."<sup>2</sup> In order to invoke the benefit of this rule, it must appear that the cause of action against the defendants is necessarily dependent upon their joint or common ownership of lands or other property. Hence, if it be shown that the injury complained of resulted from the erection of a dam by the defendants, here, as this is an act of malfeasance for which they are responsible irrespective of their cotenancy, the action will be treated as merely *ex delicto*, and the tort-feasors may be pursued either jointly or separately as the plaintiff may elect.<sup>3</sup>

#### PROCEEDINGS IN EQUITY.

§ 367. **General Principles as to Joinder of Cotenants.**—It is said to be the constant aim of courts of equity to do complete justice, and to settle the rights of all persons interested in the subject-matter of the litigation in one suit; in order that litigation may not be conducted by halves, and that the same persons may not be harassed by a multiplicity

<sup>1</sup> Low v. Mumford, 14 Johns. 426.

<sup>2</sup> Note to Cabell v. Vaughan, 1 Saund. 291 c; Mitchell v. Tarbutt, 5 Durnf. & E. 651; Converse v. Symmes, 10 Mass. 378.

<sup>3</sup> Sumner v. Tileston, 4 Pick. 308; Southard v. Hill, 44 Me. 96.

of suits in reference to the same subject-matter. Conceding that this aim is steadily pursued in these courts, and that their rules of procedure are moulded to assist in the accomplishment of the end sought, we should naturally expect to find here rules regulating the conduct of suits by persons having a union of interest, and prescribing that those persons should unite in the prosecution of a common claim. But instead of discovering invariable rules, we are compelled to concur in the following language of Judge Story, in which he reminds his readers of the impossibility of stating any rules which shall be of universal application to the joinder of parties in equity: "The truth is, that the general rule in relation to parties does not seem to be founded on any positive and uniform principle; and therefore it does not admit of being expounded by the application of any universal theorem, as a test. It is a rule founded partly in artificial reasoning, partly in considerations of convenience, partly in the solicitude of Courts of Equity to suppress multifarious litigation, and partly in dictates of natural justice, that the rights of persons ought not to be affected in any suit, without giving them an opportunity to defend them. Whether, therefore, the common formulary be adopted that all persons materially interested in the suit, or in the subject of the suit, ought to be made parties, or that all persons materially interested in the object of the suit ought to be made parties, we express but a general truth in the application of the doctrine, which is useful and valuable indeed as a practical guide, but is still open to exceptions, and qualifications, and limitations, the nature and extent and application of which are not, and cannot, independently of judicial decision, be always clearly defined."<sup>1</sup> But while rules, thus uncertain in their general application, have not been made definite nor uniform in their application to the law of cotenancy, yet the general tendency of the decisions is such as to justify the remark of Sir William Grant that, "as far as it is possible, the Court endeavors to make a complete decree, that shall embrace the whole subject, and determine upon the rights of all parties interested in the estate."<sup>2</sup>

<sup>1</sup> Story's Eq. Pl. sec. 76 c.

<sup>2</sup> *Palk v. Clinton*, 12 Ves. 58.

§ 368. In respect to joint-tenants, we find the rule thus cautiously expressed: "One joint-tenant cannot ordinarily sue or be sued without joining the other joint-tenants."<sup>1</sup> One of two joint-tenants cannot alone maintain an action for an account of the rents of the joint estate.<sup>2</sup> So where A and B brought a bill to be relieved against the City of London, because while they and C were joint lessees from the city of certain water springs at a specified rent, they were evicted from some of the springs and disturbed in the enjoyment of others; and the bill prayed that they might have several allowances out of the rent by reason of such eviction and disturbance, it was conceded that the action could not proceed without the presence of C, because if it were allowed to so proceed, C might come in and compel the defendants to relitigate the whole matter.<sup>3</sup> Upon a bill being filed to have an account of a trust, the defendant pleaded that he was trustee for the plaintiff and two others; "and that the other two not being parties to the suit, he was not bound to answer; for otherwise he might be thrice called to account for the same matter;" and the plea was allowed.<sup>4</sup>

§ 369. Joinder of Tenants in Common.—The rules governing the joinder of joint-tenants in equitable proceedings seem to be equally applicable to the joinder of other cotenants. Thus, where one of two tenants in common brought an action of ejectment to recover possession of real estate, but discovering that there was an outstanding term which the defendant intended to set up, he filed a bill praying a declaration of his right to a moiety of the estate, and for the delivery of the estate and title deeds, and for an account of the rents, it was held upon demurrer that the other cotenant was a necessary party, because the deeds could not be delivered up in the absence of a party interested.<sup>5</sup> If any one of the heirs seek to set aside a deed of their ancestor on the ground of fraud in its procurement, all the heirs must be brought before the

<sup>1</sup> Story's Eq. Pl. sec. 159.

<sup>2</sup> *Weston v. Keighley*, Finch, 82.

<sup>3</sup> *Stafford v. City of London*, 1 P. Wms. 428.

<sup>4</sup> *Hamm v. Stevens*, 1 Vern. 110; *Kirk v. Clark*, Pre. Ch. 275.

<sup>5</sup> *Brookes v. Burt*, 1 Beav. 106. See also *Munoz v. De Tastet*, Ib. p. 109; *Baker v. Harwood*, 7 Sim. 376.

Court. The deed, if set aside, affects the whole property. The Court, therefore, will not act until all persons interested are brought before it.<sup>1</sup> A assigned a certain fund, deposited in a house of agency in India, to trustees under certain trusts, under which his daughters, B and C, became entitled to the fund equally. A suit was instituted, in which C's moiety of the fund was ordered to be paid to her, and B's moiety was ordered to remain in Court. The trustees suffered the fund to remain in the house of agency until it failed. C then filed a bill against the trustees, to make them responsible for her moiety of the fund; whereupon it was held that, notwithstanding the prior decree, B was a necessary party to the new suit; and for so holding, the Vice-Chancellor gave the following reasons: "In this case there is a trust-fund, one moiety of which belongs to A, and the other moiety belongs to B; and a suit has been instituted by A, in which the allegation is that the whole fund has been improperly dealt with by the trustees. As it is not represented that B has been satisfied in respect of his share, it follows, unless B is made a party to the suit, the defendants will be subject to a second suit, as to what constitutes misfeasance of the whole fund. The whole matter must be settled in one suit; and therefore, if one of the parties interested in the fund is not a party to the suit, the Court will not give any relief as to the fund."<sup>2</sup> The trustees of a turnpike road borrowed money of A. B., giving him security on the tolls, and assigning to him such proportion of the tolls as the sum advanced by him bore to the whole sum of money advanced by himself and others on the credit of the tolls. A bill was subsequently filed by A. B. to recover what was due him under his mortgage. The Court held that as he was only one of several entitled to share in the benefit of the tolls, he could not, in the absence of the other mortgagees, sue alone for his share. "He asks to be paid what is due to him out of the moneys received or to be received under the acts of parliament, and that a receiver of the same may be appointed; but the other mortgagees are interested in those moneys, and the plaintiff cannot be paid

<sup>1</sup> *Young v. Bilderback*, 2 Green's Ch. 206; *Harding v. Handy*, 11 Wheat. 103.

<sup>2</sup> *Munch v. Cockerell*, 8 Sim. 231.

in full without diminishing the fund out of which they are entitled to be paid; and under these circumstances, I am of opinion, that in this form of suit the plaintiff is not entitled to the general relief which he prays."<sup>1</sup>

§ 370. **Joint Legatees.**—It seems to be conceded that legatees entitled to a legacy as joint-tenants thereof must file their joint bill therefor.<sup>2</sup> But if the legacy be bequeathed to them as tenants in common, a different rule prevails, at least where the legacy is ascertained and has been set apart from the residue of the testator's estate. Thus, in *Hutchinson v. Townsend*,<sup>3</sup> it was held that parties who, by virtue of the provisions of a certain will, had become entitled to one-fourth of an ascertained fund, were entitled to sue for their share without making the parties entitled to the other three-fourths parties to the suit. In a subsequent case, it appeared that a legacy of £150 had been bequeathed to B and H, and that H had filed a bill against the executor and the residuary legatee for the payment of a moiety of the £150. An objection was made that the other legatee ought to have been made a party, but it was overruled.<sup>4</sup>

§ 371. **Foreclosure against Joint Mortgagors.**—If tenants in common, or other cotenants, jointly execute a mortgage, or otherwise create a joint lien on their lands, the mortgagee, or other lien-holder, cannot be compelled to receive payment of a moiety on behalf of either cotenant.<sup>5</sup> He is entitled to have his whole demand continue secured by a lien on the entire property until payment is made in full. One mortgagor cannot, therefore, compel the mortgagee to receive half the debt, and to proceed against his cotenant's moiety for the other half, although he tender a sufficient bond of indemnity against eventual loss.<sup>6</sup> In effecting a redemption of their lands, after the sale thereof under an execution or order of sale, it is not necessary that all the co-

<sup>1</sup> *Mellish v. Brooks*, 3 Beav. 27.

<sup>2</sup> *Haycock v. Haycock*, 2 Ch. Ca. 124.

<sup>3</sup> 2 Keen, 675.

<sup>4</sup> *Hughson v. Cookson*, 3 Younge & C. 578.

<sup>5</sup> *Fisher on Mortg.* sec. 526; *Sanders v. Richards*, 2 Coll. 568.

<sup>6</sup> *Frost v. Bevins*, 3 Sandf. Ch. 188.

tenants should be present,<sup>1</sup> nor that those who are not present should have previously authorized a redemption to be made on their behalf. The parties have such a common interest, that no previous *express* authority is necessary to make a tender by one valid for all. An agency is implied by law, from the relation of cotenancy, by which either cotenant is authorized to act for all in making a tender for the purpose of securing a title and possession in which all have a common interest.<sup>2</sup> If, after a tender made by one cotenant for the purpose of redeeming the lands of the cotenancy, it becomes necessary to proceed against the purchaser to compel an acceptance of the tender, and the other cotenant refuses to participate in such proceedings, the cotenant wishing to redeem may bring his bill to enforce his equity of redemption, making his cotenant a party defendant. In such case, it seems that the cotenant so made a defendant may, notwithstanding his refusal to join in the suit, insist upon the benefit of the redemption. "His refusal to join in the suit, or his position in the suit, is of no consequence."<sup>3</sup> A judgment creditor of one tenant in common may redeem the interest of such cotenant, but he must pay the entire sum which would be necessary to effect a redemption of the whole property, while by such redemption he can acquire nothing beyond the moiety of his judgment debtor.<sup>4</sup> In foreclosing a mortgage, all the mortgagors must be made parties defendant.<sup>5</sup>

§ 372. **Foreclosure by Joint Mortgagees.**—"There can be no foreclosure or redemption, unless the parties entitled to the whole mortgage money are before the Court."<sup>6</sup> Therefore, one of the mortgagees cannot alone bring a bill to foreclose for his moiety of the mortgage.<sup>7</sup> The rule that all the

<sup>1</sup> *Beekman v. Bunn*, Hill & Denio, Supp. 265.

<sup>2</sup> *Gentry v. Gentry*, 1 Sneed, 88.

<sup>3</sup> *Gentry v. Gentry*, 1 Sneed, 90.

<sup>4</sup> *Neilson v. Neilson*, 5 Barb. 565.

<sup>5</sup> *Stucker v. Stucker*, 3 J. J. Marsh. 801. But in Georgia it has been held that a mortgage executed by two tenants in common may be separately foreclosed against each. *Baker v. Shepherd*, 80 Ga. 706; S. C. 37, Ib. 15.

<sup>6</sup> *Palmer v. Earl of Carlisle*, 1 Sim. & St. 425; *Woodward v. Wood*, 19 Ala. 213.

<sup>7</sup> Same as 4; also *Lowe v. Morgan*, 1 Bro. C. C. 368; *Forsyth v. Drake*, 1 Grant's Ch. 223; *Johnson v. Brown*, 11 Foster, 410; *Tyler v. Yreka Water Co.* 14 Cal. 218; *Cockburn v. Thompson*, 16 Ves. 324. The case of *Montgomerie v. Bath*, 3 Ves. Jr. 560 is contra.

joint mortgagees must be parties seems to be applicable, although the mortgage was taken in the name of but one, the debt secured being the joint property of all. Thus, where N, H, and J, were partners in trade, and as such had received several promissory notes from W; and thereafter W, to secure the payment of such notes, executed a mortgage to N alone, it was held that N could not, in his own name, bring a bill to foreclose, and that H and J were necessary parties, because, although the mortgage was made to N, "it was taken for the benefit of all, and the money ought to be decreed to all."<sup>1</sup> In each of the cases to which we have referred, the debt secured by the mortgage was joint. It occasionally happens that a joint mortgage is given to secure separate and distinct debts due to the mortgagees separately. In such case, there is no joint interest in the money to be decreed; and having separate debts, the mortgagees seem to occupy the same relation between each other and towards the mortgagor as though they held separate mortgages simultaneously executed. It would seem, therefore, that they could and ought to pursue separate remedies of foreclosure. In one instance, it has been determined that they *may* join in proceedings to foreclose, and the reasons assigned by the Court for its decision were such as to indicate that, in the opinion of the Court, their joinder was not optional.<sup>2</sup> On the other hand, are at least two decisions determining that the mortgagees *may* sue separately, and the language employed in these cases is such as to sustain the conclusion that the non-joinder is as compulsory as if separate mortgages had been executed for each separate debt.<sup>3</sup> A mortgage given to secure separate debts may, after its foreclosure, result in a tenancy in common of the land mortgaged. But "until a foreclosure is had upon a mortgage, or the title to the land has, by process of law, become vested in the mortgagee or mortgagees, or their assignees, their interest is one of security, and not such as to make them tenants in common of the land. The mortgage is upon the whole premises, for the security of every part of the debt named in the condition, and the judgment must go upon the whole. If there are sev-

<sup>1</sup> *Noyes v. Sawyer*, 3 Vt. 160.

<sup>2</sup> *Shirkey v. Hanna*, 3 Blackf. 403.

<sup>3</sup> *Thayer v. Campbell*, 9 Mo. 283; *Burnett v. Pratt*, 22 Pick. 557.



eral demands, each demand is a claim upon the entire property as against the mortgagor. He has mortgaged the whole premises to secure the payment of all the notes and of each note; but after the title of the property has passed from him by due process of law, the assignees become the owners of the land in proportion to their respective debts, and must adjust the matter between themselves accordingly."<sup>1</sup>

*Note.*—The Legislatures of the several States have interfered with the rules of the common law in regard to actions by cotenants against third persons, with much less frequency than with the rules relating to actions by cotenants between one another. The chief statutory innovations on the common law have been: 1st, the allowance of the joinder of tenants in common in actions to recover the possession of the common property; and 2d, authorizing the entry of judgment in favor of those entitled thereto, notwithstanding their misjoinder with persons having no interest in the property sued for. We give below extracts from such of the statutes as we have been able to discover among the compiled laws of the several States; but as the indices to these compilations are manifestly very imperfect on this subject, we have, no doubt, been unable to find many of the statutory provisions concerning actions by cotenants against strangers to the cotenancy.

CALIFORNIA.—“All persons holding as tenants in common, joint-tenants, or coparceners, or any number less than all, may jointly or severally commence or defend any civil action or proceeding for the enforcement or protection of the rights of such party.”—Sec. 884 Code of Civil Procedure.

GEORGIA.—“A tenant in common need not join his cotenant, but may sue separately for his interest, and the judgment in such case affects only himself.”—Sec. 3259 Code of Georgia, ed. of 1871.

ILLINOIS.—In actions of ejectment, if any of the plaintiffs is entitled to judgment, he may recover notwithstanding his joinder with a plaintiff not entitled to judgment.—Gross Statutes of Ill. p. 246, sec. 26.

INDIANA.—In this State, in actions to recover possession of real estate, “Where there are two or more plaintiffs or defendants, any one or more of the plaintiffs may recover against any one or more of the defendants, the premises or any part thereof, or any interest therein, or damages according to the right of the parties; but the recovery shall not be for a greater interest than is claimed.” (Rev. St. vol. 2, p. 167, sec. 600, vol. 2 Gavin & Hord, p. 283.) Actions for nuisance “may be brought by any person whose property is injuriously affected, or whose personal enjoyment is lessened by the nuisance.”—Sec. 629, *Ib.* p. 289.

See § 614, p. 285, as to action against his cotenant.

MAINE.—“Persons claiming as tenants in common, joint-tenants, or coparceners, may all, or any two or more, join in a suit for recovery of lands; or one may sue alone.

“The demandant may recover a specific part or undivided portion of the premises to which he proves a title, though less than he demanded.”—Rev. St. Me. p. 762, secs. 9, 10, ed. 1871.

“All or any of the tenants in common, coparceners, or joint-tenants of any lands,

<sup>1</sup> 1 Johnson v. Brown, 11 Foster, 412.



may join or sever in personal actions for injuries done thereto, setting forth in the declaration the names of all the cotenants, if known, and the Court may order notice to be given in such actions to all other cotenants known, and all or any of them, at any time before final judgment, may become plaintiffs in the action, and prosecute the suit for the benefit of all concerned.

"The Court shall enter judgment for the whole amount of the injury proved, but award execution only for the proportion thereof sustained by the plaintiffs; and the remaining cotenants may afterwards jointly or severally sue out a *scire facias* on such judgment, and execution shall be thereupon awarded for their proportion of the damages adjudged in the original suit."—*Ib.* p. 733, secs. 14, 15.

MASSACHUSETTS.—"Any two or more persons claiming the same premises as joint-tenants, tenants in common, or coparceners, may join in a suit for the recovery thereof, or any one may sue alone for his share.

"The demandant may recover any specific part of the premises, or any undivided portion thereof to which he proves a sufficient title, though such part or portion is less than that demanded in the writ."—*Genl. St. of Mass.* p. 692, secs. 9, 10, ed. of 1860.

MICHIGAN.—"When any person shall die, leaving heirs, either in the same or in different degrees, and where several persons shall be, in any other way, entitled to real estate as tenants in common, or as joint-tenants, they may bring a joint action for the recovery thereof, or may bring several actions for their respective shares or interests."—*Comp. Laws*, sec. 6386, ed. of 1871.

MISSISSIPPI.—In this State, cotenants may sue jointly or severally in ejectment; and if they sue jointly, and but one be entitled to judgment, he may recover.—*Rev. Code of Miss.* secs. 1552 to 1554, ed. of 1871.

MISSOURI.—Sec. 8 of chapter 151 of the Revised Statutes of this State, (Wagner's Stats. 558,) relating to ejectment, provides that "two or more tenants in common may join in the action, and jointly prosecute and sustain such action for the recovery of the estate by them owned in common."

Sec. 10 of the same chapter provides that "where there are two or more plaintiffs, any one or more may recover any interest they may be entitled to, in the same manner as if they had brought separate actions; and it shall not be any objection to a recovery in such action that any one or several of the plaintiffs do not prove any interest in the premises claimed, but those entitled shall have judgment, according to their rights, for the whole, or such part or portion as he, she, or they might have recovered if they had brought separate suits."—Wagner's Stats. 559, sec. 10.

RHODE ISLAND.—"In actions of ejectment, or other actions concerning any estate holden or claimed in coparcenary, common or joint tenancy, where the possession of such estate claimed is the object of the suit, the same may be commenced by all or any two or more of the coparceners, tenants in common, or joint-tenants, or the same may be brought by each one for his particular share of such estate; and the same rules shall prevail in actions of trespass for mesne profits."—*Genl. St.* ed. of 1873, p. 519, sec. 1.

VIRGINIA.—"Tenants in common may join or be joined as plaintiffs or defendants."—*Code of Va.* chap. 164, sec. 2, ed. of 1873, p. 1081.

WISCONSIN.—"When any person shall die, leaving heirs, either in the same or in different degrees, and where several persons shall be in any other way entitled to real estate as tenants in common, or as joint-tenants, they may bring a joint action for the recovery thereof, or may bring several actions for their respective shares or interests."—*Taylor's St. of Wis.* vol. 2, p. 1713, sec. 9.

## CHAPTER XVI.

### EFFECT OF STATUTE OF LIMITATIONS ON ACTIONS BY AND BETWEEN COTENANTS.

**Actions between Cotenants, § 373.**

**Actions against third persons, § 374.**

**Disability of one Cotenant in Joint Action, § 375.**

**Statutes construed to allow all the benefit of one's disability, § 376.**

**Suit by Cotenant under disability, without joining the others, § 377.**

**Joinder of barred Cotenant, when fatal, § 378.**

§ 373. **Actions between Cotenants.**—The statute of limitations operates upon causes of action existing in favor of one cotenant and against another, to the same extent that it operates in actions between persons not within the relation of cotenancy. The only peculiar difficulty in the application of the statute to actions between cotenants is in determining at what period it began to run. This difficulty arises only in actions growing out of the cotenancy; for if the suit be based upon some cause of action disconnected from the cotenancy, the accidental circumstance that the parties are cotenants neither affects the cause of action nor the operation of the statute thereon. Nearly all actions, arising out of the cotenancy, which may be successfully prosecuted by one cotenant against another must be preceded by and grounded upon some act done by the latter, and which the law regards as an ouster of the former. In all such cases, the ouster or act of exclusion at once creates a cause of action, and the statute commences to run simultaneously with the creation of this cause. But a cotenant may be called upon to account for rents and profits received by him; and a difference of opinion exists as to whether the statute commences to run in his favor from the

date of his reception of the moneys for which he is liable to account, or not until he has shown an intention of holding such moneys adversely to his cotenants. According to one of the authorities: "The statute of limitations does not commence running, in the case of tenants in common, until the relation is determined by partition, or there is a demand to be let into possession and an actual ouster; or a demand for an account, and the right is denied. There cannot be such an adversary possession as to make the statute run, in reference to the right to an account of the profits, when it does not also run in reference to the right of possession, which can only be when there is an *ouster*, really made or presumed from lapse of time."<sup>1</sup> So in Georgia, it has been held that as the statute creating the liability of a cotenant to account professed to make him chargeable as "bailiff," he can only assert the statute of limitations in circumstances which would enable a bailiff to assert it; and this being so, that there is necessarily the same relation between the cotenants as there is between trustee and *cestui que trust*, executor and legatee, administrator and heir, guardian and ward; and that "the relation between these is such that it prevents the statute of limitations from running until the executor, the administrator, or the guardian as the case may be, has begun to hold adversely to his correlative, and knowledge of that fact has come to the correlative."<sup>2</sup> But a majority of the American cases are not in harmony with those just cited. In Alabama, it is said that conceding that a cotenant receiving rents or profits holds a moiety as trustee, yet his is an implied and not an express trust, and therefore the statute runs in his favor.<sup>3</sup> In another case, the Court based its decision on the ground that as the receipt of rents and profits by one tenant in common "imposes on him who receives an *immediate* accountability to the other, for the part of the profits to which he is entitled," and as the precedents in declarations for accounting show that no allegation of a demand is necessary, it follows that when one cotenant receives more than his share of the rents and profits, he is at

<sup>1</sup> *Northcot v. Casper*, 6 Ired. Eq. 306, overruling *Wagstaff v. Smith*, 4 Ired. Eq. 1, and reinstating *Wagstaff v. Smith*, 2 Dev. Eq. 264.

<sup>2</sup> *Huff v. McDonald*, 22 Geo. 164.

<sup>3</sup> *Tarleton v. Goldthwaite's Heirs*, 23 Ala. 358.

once and without a demand liable therefore, and that the statute commences running as soon as the liability is complete.<sup>1</sup> In England, it has been said that "in the case of joint-tenants or parceners, there is a mutual trust between them, and they are accountable to each other, without regard to lapse of time;" but that "it is otherwise in the case of tenants in common."<sup>2</sup>

§ 374. **Actions against Third Persons.**—It is obvious that the operation of the statute of limitations upon a cause of action accruing in favor of two or more as cotenants, must be identical with its operation upon a similar cause of action accruing to one person in severalty, provided that all the cotenants are free from those disabilities which exonerate parties from prosecuting their causes of action, and therefore prevent the running of the statute of limitations.

§ 375. **Disability of one Cotenant in Joint Actions.**—But some of the cotenants may be adults and others minors, or if all be adults, some of them may be under the disability, and therefore within the privileges of coverture. In case one of the cotenants has been under some disability, and therefore is exempt from the operation of the statute, the effect of his exemption may be brought in question: 1st, in actions in which he has joined with the other cotenants; 2d, in actions brought by himself alone. Actions of the first class may be considered with reference: 1st, to joint causes of action which, by the common law, were required to be jointly prosecuted; 2d, to causes of action which, by common law or by statutory provisions, the cotenants were not required to join in prosecuting. A preponderance of the authorities, we think, sustains the general proposition that whenever a joint cause of action exists, and the statute of limitations is a bar to any of the plaintiffs, it is a bar to all.<sup>3</sup> "It is now well settled that where several persons are entitled to an action, in order to avoid the effect of the statute

<sup>1</sup> *Wagstaff v. Smith*, 4 Ired. Eq. 3, overruled in 6 Ired. Eq. 806; but followed and supported by decisions in other States. See *Corbett v. Laurens*, 5 Rich. Eq. 801; *Coleman v. Hutchenson*, 3 Bibb, 214.

<sup>2</sup> *Prince v. Heylin*, 1 Atk. 493.

<sup>3</sup> *Hardeman v. Sims*, 3 Ala. 747; *Perry v. Jackson*, 4 T. R. 516.

of limitations, the whole of them must labor under the same disability."<sup>1</sup> "It seems to be a settled rule that all the plaintiffs in a suit must be competent to sue, otherwise the action cannot be supported. When once the statute runs against one of two parties entitled to a joint action, it operates as a bar to such joint action."<sup>2</sup> "Whenever the statute of limitations is a bar to the recovery of one of the parties in such action, it operates against the whole, because the disability of one does not save the right of the others. The statute protects the rights of those who are incompetent to protect themselves; but, where some of the parties are competent, they ought to take care of the interests of all, by prosecuting the suit within time."<sup>3</sup> In this respect, the common is in striking contrast with the civil law. According to Domat: "If one that is major happens to have a right undivided with a minor, the prescription which could not run against the minor will have no effect against the major. Thus, for example, if a service of passage is due to a major and to a minor, for a ground which is common to them both, the one and the other having ceased to make use of this right during time sufficient to prescribe, the service which the minor could not lose by prescription will be preserved likewise for the major."<sup>4</sup> While the civil law is lenient towards the major in circumstances which do not seem to entitle him to any special consideration, and solely because of an association which on his part is accidental rather than meritorious, the common law, on the other hand, is unjust to a minor in circumstances which do not seem to justify unusual harshness, and solely on account of an association which, on his part, is fortuitous rather than culpable. But there are a number of American cases in full harmony with the civil law as stated in foregoing quotation from Domat.

Mr. Justice Cheves, in the case of *Faysoux v. Prather*,<sup>5</sup> decided in 1818, stated that "according to the decisions of our

<sup>1</sup> *Milner v. Davis*, Litt. Select Cases, 436.

<sup>2</sup> *Marsteller v. McClean*, 7 Cranch, 158; *Allen v. Beal's Heirs*, 8 A. K. Marsh. 554; *Jordan v. McKenzie*, 30 Miss. 32; *Dickey v. Armstrong*, 1 A. K. Marsh. 39; *Wells v. Ragland*, 1 Swan, 501; *Barrow's Lessee v. Nave*, 2 Yerg. 229.

<sup>3</sup> *Riden v. Frior*, 8 Murph. 577.

<sup>4</sup> Domat's Civil Law by Strahan, Part I. B. III. Tit. VII. Sec. V. Art. V.

<sup>5</sup> 1 Nott & McC. 298, followed in *Lahiff v. Smart*, 1 Bailey, 192.

Courts, where two or more are interested as coparceners, or joint-tenants, or tenants in common, if one be under the disability of infancy, it saves the rights of others from the effect of the statute." In an early case in Connecticut, it is said that "there can be no question but the rule of the common law on a joint suit is, that the minority of one will save the rights of those of full age; for the recovery must be joint, and no one without the other can recover."<sup>1</sup> There are also quite a number of decisions to the effect that where several parties to an action are required within a specified time to jointly prosecute some proceeding to obtain a review of a judgment or decree, and one of these parties is exempted from this requirement on account of certain disabilities, then all are so exempted.<sup>2</sup> The authorities thus opposed to one another are all based upon the assumption that a joint right or a joint cause of action cannot be severed. Reasoning from this assumption, different Courts have attained diametrically opposite conclusions. On one hand, it is said that because the action is necessarily joint, it must follow that whenever the statute extinguishes the cause of action as to one cotenant it extinguishes it as to all. On the other hand, it is said, with equal force, that whenever a cause of action is necessarily joint, it must follow that the keeping of such cause alive as to one cotenant is keeping it alive as to all. And as considerations of inconvenience and hardship are apt to prevail over those general rules by which all systems of jurisprudence ought to be distinguished, it is natural that we should find decisions which, though emanating from Courts professedly engaged in administering the common law, are totally irreconcilable with both the theories referred to in this section. These decisions are attempts to obtain a middle ground which shall be free on the one side from the manifest hardship of involving the minors in a common ruin with the majors, and on the other side, of the equal injustice of conceding to the majors the peculiar advantages intended solely for the minors. In South Carolina, several joint plaintiffs sued in trover for the conversion of a slave. The defendant pleaded the statute

<sup>1</sup> *Stanford v. Button*, 4 Day, 311.

<sup>2</sup> *Kennedy's Heirs v. Duncan*, Hardin, 365; *Wilkins v. Phillips*, 3 Ohio, 50; *Meese v. Keefe*, 10 Ohio, 362; *Sturges v. Longworth*, 1 Ohio St. 561.

of limitations; and the replication showed that one of the plaintiffs had been under some disability, and was not therefore barred by the statute. O'Neill, Justice, delivered the opinion of the Court of Appeals, saying: "I apprehend, too, that notwithstanding the plaintiffs are joint, that one may in trover recover, and the others fail, under the plea of the statute of limitations. The party having the benefit of the disability would be entitled to judgment for damages found for the conversion of his title. For the defendant who relies upon the statute, and thus succeeds in cutting off two out of three plaintiffs, is properly only a wrongdoer against the one to whom the statute does not apply. If the defendant and the plaintiff not barred by the statute, after the allowance of its bar against the adult plaintiffs, were even to be regarded as tenants in common, the defendant's plea of the statute of limitations would be such evidence of the assertion of an adverse claim as would amount to an ouster, upon which the minor would be entitled to recover."<sup>1</sup>

§ 376. **Statutes allowing to all the benefit of one's Disability.**—A distinction has been claimed and allowed in several of the State Courts between cases in which, when the cause of action accrued, some of the cotenants were free from disabilities, and cases in which all the cotenants were under disability when the cause of action accrued to them; and it has been held that in the last named cases the statute does not commence running against *any* until *all* are freed from their disability. These decisions rest for their justification upon the peculiar language of the statutes of limitations under which they were made.<sup>2</sup> These statutes so employ the plural

<sup>1</sup> *Henry v. Means*, 2 Hill, S. C. 382. See to the same effect *Jordon v. Thornton*, 7 Geo. 520.

<sup>2</sup> The statute of Mississippi, which is said to be substantially identical with that of the other States in which the decisions referred to in the text have been made, is as follows: "If any person or persons, who is, or are, or shall be entitled to any of the actions specified in the three preceding sections of this act, is, or are, or shall be at the time of any such action accruing, within the age of twenty-one years, *feme covert*, or insane, then such person or persons shall be at liberty to bring such action, so as he, she, or they institute or take the same within such time as is before limited, after his, or her, or their coming to or being of full age, discover, or of sane memory, as by other person or persons having no such impediment, might have done."—Howard & Hutchinson's Stats. p. 569, sec. 94.



word "they" as to give much force to the idea that the legislators intended by the use of that word that a statute prevented from running by the joint or common disability of all, should continue in abeyance until such disability was removed from all. The construction of one of these statutes, and the reasoning therefor, were thus given by the Supreme Court of Tennessee: "If one of several, entitled to a joint action, be over the age of twenty-one years at the time the action accrues, the statute runs against all, although the others are infants; because 'they' who are entitled to the action were not under the age of twenty-one years, seeing one of them was not, and therefore none of them are within the saving. But if all the persons entitled to a joint action are within the age of twenty-one years at the time such action accrues, then the action is within the saving, until 'they' who are entitled to it shall become of full age. As the word 'they' in the former case includes all those entitled to the joint action, and one of them not being within the age of twenty-one, all of them are excluded by the saving; so in the latter case, if all are within the age of twenty-one when the action accrues, and so are within the saving, all must continue within the saving so long as one of them remains under the age of twenty-one, for until then, 'they' have not attained 'their' full age."<sup>1</sup>

§ 377. **Suit by a Cotenant under Disability.**—We shall now consider actions of the second class, namely, those brought by the person under disability, without joining any of his cotenants. It appears from the authorities already considered that if the cause of action be a joint one—such a one that the failure to unite all the cotenants would prove fatal, if taken advantage of by proper plea—then such cause is either entirely barred by or entirely saved from the operation of the statute. In such cases therefore the cotenant under disability has nothing to gain by suing alone; for unless he can recover in conjunction with his cotenants he cannot recover at all.<sup>2</sup> But in some States, a cotenant entitled to sue

<sup>1</sup> *Shute v. Wade*, 5 Yerg. 9; *Masters v. Dunn*, 30 Miss. 268; *Heron v. Marshall*, 5 Humph. 443; *Wells v. Raglan*, 1 Swan, 501; *Jones v. Henry*, 3 Litt. 48; *Riggs v. Dooley*, 7 B. Monr. 240; *Clay's Heirs v. Miller*, 3 Monr. 146; *Seay v. Bacon*, 4 Sneed, 102.

<sup>2</sup> See sec. 375.



without joining his cotenants, may ordinarily, as against a stranger to the cotenancy, recover possession of the whole of the common property. The question frequently arises, does the disability under which a cotenant has labored protect him from the statute as to his moiety alone, or does it secure him in the right which he ordinarily has to recover from a stranger the possession of all the lands of the cotenancy? The answer must be that except as to his own moiety his cause of action is lost. So far, the effect of the statute upon his cotenants operates also against him.<sup>1</sup> Where one of two coparceners was under a disability, and entered within twenty years after the removal of such disability, it was held that her entry could not operate in favor of the other coparcener who had not been under any disability.<sup>2</sup> The rule that a cotenant saved from the operation of the statute cannot recover the whole of the lands of the cotenancy "is founded on the proposition that when the statute has fully run, and has become effectual to bar and adverse title, the disseizor acquires a new title founded on disseizin. He does not acquire or succeed to the title and estate of the disseizee, but is vested with a new title and estate, founded on and springing from the disseizin; and the title of the disseizee, if not wholly extinguished, has at least become inoperative in law, and is without a remedy to enforce it. The new title thus acquired by the disseizor must of necessity correspond with that on which the disseizin operated, as he could not acquire by disseizin a greater estate than that held by the disseizee. If the latter held only an undivided interest as tenant in common with another, the disseizor would acquire by disseizin a similar undivided interest; for it was only that on which the disseizin operated and took effect. The disseizor of one of several tenants in common acquiring a title by disseizin, therefore, becomes himself a tenant in common with the other cotenants; and hence in an action by one or more of them against him for the possession, the recovery is limited to the particular interest of the plaintiff, and does not include the whole property."<sup>3</sup> As the title

<sup>1</sup> *Pendergrast v. Gullatt*, 10 Geo. 224; *Bowyer v. Judge*, 11 East, 287; *Bryan v. Hinman*, 5 Day, 218.

<sup>2</sup> *Roe on dem. Langdon v. Rowleston*, 2 Taunt. 445.

<sup>3</sup> *Williams v. Sutton*, 43 Cal. 73.

of the cotenants not under any disability is extinguished by the operation of the statute, it follows that the cotenant not under disability cannot obtain any rights by a deed from them, nor through a partition to which they are parties. In some instances, an attempt has been made to evade the force of the statute by means of a suit in partition in which lands adversely held for a period sufficient for the acquisition of title by prescription were set off to a cotenant whose minority saved him from the bar of the statute. But these attempts proved futile; and the cotenant was, in his recovery, confined to the moiety to which he was entitled independent of the partition.<sup>1</sup>

§ 378. Joinder of Cotenant barred by the Statutes, when fatal.—While the state of the authorities is such as to admit of grave doubt as to whether in case of *joint* actions the disability of one cotenant operates for the benefit of all, or whether the want of disability in one operates to the detriment of all, yet this seems certain: that, in the absence of peculiar statutory provisions, whenever the rights of cotenants may be secured by *separate* actions, and adequate means of redress are therefore within the reach of each, a cotenant not under any disability cannot avail himself of the disability of any of his cotenants.<sup>2</sup> But the cause of action or the nature of the cotenancy may be such that the cotenants could have either joined or severed in the prosecution of their remedies. In such case, while it is generally and we believe universally conceded that the cotenants not under disability shall not derive any benefit from the disability of the minor cotenants, more doubt must be felt, after an examination of the authorities, upon the question whether, if a joint action be brought, a judgment may be entered against those barred by the statute and in favor of those against whom the statute has not run. But we think that a considerable majority of the authorities upon this question assert that, by electing to participate in a joint action, the plaintiff not barred by the statute has involved himself in a common fate with his coplaintiffs; and

<sup>1</sup> *Wade v. Johnson*, 5 Humph. 118; *Bronson v. Adams*, 10 Ohio, 135.

<sup>2</sup> *Williams v. First Presbyterian Church*, 1 Ohio St. 495; *Bronson v. Adams*, 10 Ohio, 136.

therefore that a judgment must be entered against all.<sup>1</sup> But in Tennessee, upon a joint demise by tenants in common, although some of them are barred by the statute, the others may recover judgment for their moieties.<sup>2</sup> In Vermont, an administrator brought an action of ejectment for the benefit of several heirs. It appeared that some of these heirs were barred by the statute and others were not. And thereupon the Court said that “as this is not a case of joint-tenancy—in which all must join in bringing suit—the rights of some may be barred and not those of others: as some might have conveyed their interests by deed, or be barred by estoppel; so also by the statute of limitations.”<sup>3</sup>

<sup>1</sup> *Sanford v. Button*, 4 Day, 312; *Keeton v. Keeton*, 20 Mo. 544; *Walker v. Bacon*, 32 Mo. 159; *Thomas v. Machir*, 4 Bibb, 412; *Dickey v. Armstrong*, 1 A. K. Marsh. 39; *Moore v. Armstrong*, 10 Ohio, 17.

<sup>2</sup> *Barrow's Lessee v. Navee*, 2 Yerg. 227.

<sup>3</sup> *McFarland v. Stone*, 17 Vt. 175.

## CHAPTER XVII.

### PART OWNERS OF SHIPS.

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Compulsory Sale, denied in England, § 391.

Compulsory Sale, when ordered in United States, § 392

§ 379. **Part Owners are Tenants in Common.**—Property in a ship, whether acquired by two or more persons by a joint building, or by a joint purchase, or by whatsoever means acquired, is, unless the acquisition was made by them as partners or with the intention of holding it as partnership property, held by a tenancy in common. Notwithstanding the early preference of the common law for joint-tenancies, the case of property acquired in merchandizing or in the business of commerce and navigation always formed an exception to the general rule; and if, for any purpose whatever, part owners of ships were ever regarded as joint-tenants, no instance has ever been brought to our attention in which the *jus accrescendi* was allowed between them.<sup>1</sup> So while part owners may fre-

<sup>1</sup> Flanders on Shipping, sec. 363; *Montell v. The Rutan*, 1 Int. R. Rec. 125; *Mumford v. Nicoll*, 20 Johns. 621; *Maunder & Pollock on Merchant Shipping*, 72; *Revans v. Lewis*, 2 Paine C. C. 202; *Buckman v. Brett*, 22 How. Pr. 233; *Wright v. Marshall*, 3 Daly, 331; *Lee's Law of Shipping*, 42; *Bulkley v. Barber*, 6 Exch. 164; S. C. 1 Eng. L. & E. 506; *Sheehan v. Dalrymple*, 19 Mich. 241; *Magruder v. Bowie*, 2 Cr. C. C. 577. The law as stated in the text, and supported by the foregoing authorities, is not universally admitted. The most unqualified denial of the rule that part owners of ships

quently be partners, yet it is certain that the mere fact of the part ownership does not raise a presumption of partnership.<sup>1</sup> "To hold part owners to be partners, without an express contract to that effect, would not only violate the legal principles which govern tenancies in common, but enable one part owner—though of only one-hundredth part—to sell the whole ship or whole property owned in common, which is neither in conformity to usage or the fitness of things in such adventures."<sup>2</sup> While part owners by virtue of their common ownership of a ship are not made partners, yet they are frequently partners in its employment, and therefore often occupy a very different relation towards the vessel itself from that which they occupy towards the proceeds derived from its use. It seems to be conceded that two part owners employing their ship in any adventure to the cost of which they jointly contribute, and in the loss or profit of which they are jointly to

are tenants in common is that made by Mr. Maclachlan in his *Treatise on the Law of Merchant Shipping*, p. 87, where he states that "if a ship, or shares therein, are vested in several persons jointly with unity of title and no distinction of interest, they are joint-tenants of the property so held." The position here assumed without any qualification would, if sustainable, make the part owners joint-tenants both in law and in equity, and vest the entire ship in the survivor. A less advanced position is that assumed in a note which first appeared in the 4th edition of *Abbott on Shipping*, in which, if we understand it, the view is maintained that part owners of ships may be joint-tenants at law, and that the interposition of equity is necessary to prevent the operation of the law of survivorship. This note is as follows: "If the interests are not severed and distinguished, but the entire ship is granted to a number of persons generally, it is apprehended that they become joint-tenants at law, and that the rule *jus accrescendi inter mercatores locum non habet*, which is applicable to a ship, is to be enforced only in a court of equity." (*Abb. on Shipping*, p. 97, note.) The position of Mr. Maclachlan, and that of the note to Abbott, are equally, so far as we have been able to ascertain, without support in the reported adjudications. But, on the other hand, the cases treating part owners as invariably tenants in common have usually been based upon the assumption that the law was as stated, rather than upon any consideration of the precise point suggested in the note to Abbott. In America, the specification of the shares of each part owner has frequently been omitted, both in the register and in the bill of sale; and this omission has never occasioned them to be regarded other than as tenants in common. (*Merrill v. Bartlett*, 6 Pick. 46; *Thorn-dike v. De Wolf*, 6 Pick. 120; *Glover v. Austin*, Id. 209; *Ohl v. Eagle Ins. Co.* 4 Mason, 172, 390.) The American text-writers generally repudiate, with considerable emphasis, the distinction sought to be introduced by the note to Abbott. See *Parsons on Shipping*, p. 90; *Story on Partnership*, sec. 417; note to p. 97 of 6th Am. ed. of *Abbott on Shipping*.

<sup>1</sup> *Maude & Pollock on Merchant Shipping*, 72; *Hopkins v. Forsyth*, 14 Penn. St. 34; *Holderness v. Shackels*, 8 Barn. & C. 612; *Knowlton v. Reed*, 38 Me. 246; *Williams v. Sheppart*, 1 Green, 76; *Patterson v. Chalmers*, 7 B. Mon. 595.

<sup>2</sup> *Macy v. De Wolf*, 3 Wood. & M. 193.

participate, become partners as to that adventure, and hold the proceeds thereof subject to the law of copartnership.<sup>1</sup>

§ 380. **Number of Shares into which Ships are divided.**—Section 37 of the English Merchant Shipping Act prescribes that:

(1.) “The property in a ship must be divided into sixty-four shares.

(2.) “Subject to the provision with respect to joint owners or owners by transmission, not more than thirty-two individuals may be registered at the same time as owners of one ship. This rule does not, however, affect the beneficial title of any number of persons, or of a company represented by or claiming under or through a registered joint owner.

(3.) “No person may be registered as owner of a fractional part of a share; but any number of persons not exceeding five may be registered as joint owners of a ship or of a share or shares therein.”<sup>2</sup>

§ 381. **Difference between Tenants in Common and Part Owners.**—Although part owners of vessels are generally conceded to hold their property as tenants in common, yet the nature of this species of property, the employment for which it is intended, and the general interest which the public has in its management, all conspire to make the relation of the part owners, both among one another and between themselves and strangers, different in many respects from that of ordinary tenants in common. This difference has very naturally resulted in a corresponding difference in the rules of law governing ordinary tenancies in common and those governing part ownership of ships. We shall therefore proceed, as briefly as possible, to show in what respects part owners of vessels are subject to the law applicable to ordinary tenancies in common, and what rules and remedies have been provided by law applicable only to part ownership of ships. In employing the term ships, we intend to use it “in the ancient and large sense as including all water-borne vessels, for carriage of men or merchandise.”<sup>3</sup>

<sup>1</sup> Parsons on Shipping, 91; Merritt v. Walch, 32 N. Y. 685; Donnell v. Walch, 33 Ib. 43.

<sup>2</sup> Maude & Pollock on Merchant Shipping, 8.

<sup>3</sup> See Parsons on Partnership, 549.

§ 382. **Cause of difference between Cotenancy and Part Ownership.**—We now come to consider the *differences* between the law of part ownership of ships and the law of ordinary cotenancies; and we cannot do better than to introduce this subject in the same language with which Mr. Abbott (afterwards Lord Tenterden) introduced it to the readers of his work on shipping: “A personal chattel, vested in several distinct proprietors, cannot possibly be enjoyed advantageously by all, without a common consent and agreement among them: to regulate their enjoyment in case of disagreement is one of the hardest tasks of legislation; and it is not without wisdom, that the law of England in general declines to interfere in their disputes, leaving it to themselves either to enjoy their common property by agreement, or to suffer it to remain unenjoyed, or perish by their dissension; as the best method of forcing them to a common consent for their common benefit. But of ships, ‘which are built to plough the sea, and not to lie by the walls,’ commercial nations consider the actual employment as a matter, not merely of private advantage to their owners, but of public benefit to the State, and therefore have laid down certain positive rules in order to favor this employment, and to prevent the obstinacy of some of the part owners from condemning the ship to rot in idleness.”<sup>1</sup>

§ 383. **The relations of part owners of ships among one another are, in nearly all respects, subject to the rules applicable to ordinary tenancies in common.** Owning separate and distinct moieties, and having no joint interest, there is no privity between them, and neither is bound by the acts or admissions of the other.<sup>2</sup> “When contraband goods belong to a part owner of the ship, the contraband penalty, or rather the penalty of contraband, affects only the interest of the part owner in the ship. His cotenants are not affected.”<sup>3</sup> If one part owner assume to act as the agent of the others, his authority must first be established before his acts will be regarded

<sup>1</sup> Abbott on Shipping, 98.

<sup>2</sup> Flanders on Shipping, sec. 386; Maude & Pollock on Shipping, 77; McLellan v. Cox, 36 Me. 95; Jagers v. Binnings, 1 Stark. 64.

<sup>3</sup> Flanders on Shipping, sec. 211; The Jonge Tobias, 1 Rob. Ad. R. 329.

as binding on his co-owner.<sup>1</sup> In making transfers of a ship, or of any interest therein, each part owner must act for himself, or by his duly authorized agent. As in all other tenancies in common, neither of the cotenants has any authority as such to sell or transfer the interest of the other,<sup>2</sup> but each is at liberty to transfer his own moiety to whomsoever he pleases.<sup>3</sup> One part owner has no implied authority to effect a policy of insurance on the interest of the other.<sup>4</sup> Part owners of ships, while they have interests so distinct that neither has any authority to do any act to bind or prejudice the other, are, like other tenants in common, so associated in interest that neither will be permitted to take undue advantage of the other. "They are bound to deal fairly by each other, and each, in the exercise of his own powers, must respect the rights of all the rest. This would flow from the principles of justice and morality; but it would seem that public policy comes in aid of these principles, in relation to a property of which the proper use and management are so important to the public. Hence, in one interesting case, where some part owners in a valuable ship sold their shares by an indenture between them and the purchaser, which contained covenants that, in the opinion of the Court, tended to control the appointments of persons to be employed in the management and navigation of the ship, it was held that such a contract violated the rights of the other owners, and also principles of public policy; and that it was therefore void."<sup>5</sup>

§ 384. **Power of a Part Owner to bind his Co-owners.**—In the preceding section we have stated, in general terms, that an agency from one part owner to another must be affirmatively established before the former can be bound by the acts of the latter. The more recent decisions render it doubtful whether a part owner of a ship, as such, has any greater authority to represent his companions in interest than

<sup>1</sup> MacLachlan on Shipping, 101.

<sup>2</sup> Parsons on Shipping, 92; *Henshaw v. Clark*, 2 Root, 103.

<sup>3</sup> MacLachlan on Shipping, 97; Parsons on Shipping, 92.

<sup>4</sup> *Hooper v. Lusby*, 4 Camp. 66; *Peoria Ins. Co. v. Hall*, 12 Mich. 202; *Turner v. Burrows*, 8 Wend. 144; *Patterson v. Chalmers*, 7 B. Monr. 595; *Abbott on Shipping*, 106-7; *French v. Backhouse*, 5 Burr. 2727; *Bell v. Humphries*, 2 Starkie, 345.

<sup>5</sup> Parsons on Shipping, 124; referring to *Card v. Hope*, 2 Barn. & C. 661.



though their cotenancy embraced an ordinary chattel.<sup>1</sup> But, according to the views of Chancellor Kent, "as the law presumes that the common possessors of a valuable chattel will desire whatever is necessary to the preservation and profitable employment of the common property, part owners, on the spot, have an implied authority from the absent part owners to order for the common concern whatever is necessary for the preservation and proper employment of the ship. They are analogous to partners, and liable under that implied authority for necessary repairs and stores ordered by one of themselves; and this is the principle and limit of the liability of the part owners."<sup>2</sup> The views thus expressed were well supported by the opinions of eminent text-writers and jurists. Thus, Mr. Abbott stated in his treatise on shipping, that "with regard to the repairs of a ship and other necessities for the employment of it, one part owner may, by ordering those things on credit, render his companions liable to be sued for the price of them, unless their liability be expressly provided against."<sup>3</sup> It is now well settled in England, and perhaps in the United States, that the rule as stated by Chancellor Kent and by Mr. Abbott is too broad; and that one part owner has not, merely from the fact of part ownership, an implied authority to bind his co-owners even for necessary repairs. The implied authority must be established from other circumstances in addition to that of the co-ownership. In the case of *Brodie v. Howard*,<sup>4</sup> it was sought to charge the defendant, as part owner of a ship, for work done to the vessel by the plaintiff, a ship builder, which repairs, it appeared, had been ordered by one Lewis, the defendant's co-owner, and superintended by one Turner, the captain, and which were necessary in order to enable the ship to retain her class. On the trial, it appeared that Lewis was

<sup>1</sup> Parsons on Shipping, 97.

<sup>2</sup> 3 Kent's Comm. 155.

<sup>3</sup> Abbott on Shipping, 105. The authorities now cited in support of this passage are *Wright v. Hunter*, 1 East, 20; *Ex parte Bland*, 2 Rose, 93; *Bickham v. Knight*, 5 Scott, 629; *Thompson v. Finden*, 4 Carr. & P. 158. Of these only the first named had been decided when Mr. Abbott's first edition appeared; and none of them fully sustain the rule in support of which they are cited. The case which more nearly than any other English adjudication concurs in the rule of Mr. Abbott is *Gleadon v. Tinkler*, Holt's N. P. C. 586, decided in 1817, by Lord Chief Baron Richards.

<sup>4</sup> 17 Com. B. 109; S. C. 33 E. L. & E. 146.

the owner of 56-64ths, and the defendant of the other 8-64ths; that Lewis, who had always acted as managing owner, gave the order for the repairs. Twelve days after the repairs commenced, the defendant notified the plaintiff that he would not be responsible for them. On the part of the defendant, it was proved that immediately after the arrival of the vessel in port he wrote to Lewis, informing him that he did not intend to sail her again. On these facts, the plaintiff insisted that the defendant, "as one of the registered owners, was, under the circumstances, liable for all the expenses incurred in repairing the ship, or, at all events, for those incurred prior to the date of his notice. For the defendant, it was contended that the fact of his being named as co-owner in the register was no evidence of his having authorized Lewis or the captain to pledge his credit for repairs, and consequently that he was not liable for any part thereof. Under the direction of the Lord Chief Justice, a verdict was found for the defendant—leave being reserved to the plaintiff to move that a verdict be entered for him." Subsequently, a rule *nisi* was obtained. After full argument, the rule was discharged, separate concurring opinions being given by the Chief Justice and three of the Associate Justices. From these opinions, we select that of Williams, J., as expressing, in the most terse form, the views in which the whole bench seemed to concur: "It is well established that part owners of a ship are not in the position of partners. It is true they resemble partners in respect of the concerns of the ship to this extent, that, generally speaking, all are liable for repairs and other necessary expenses which are shown or may be presumed to have been incurred with their assent. But their position differs from ordinary part owners in this, that the authority which one part owner gives to another to act as his agent is not an authority that is necessarily incident to their relation, as in the case of partners. It is in vain for a man to repudiate the authority of his partner to bind him by his contracts, unless that repudiation is communicated to those with whom the firm has dealings. There is no authority to show that any such rule holds as to part owners of a ship. The onus of making that out lay upon plaintiff's counsel; and they have failed to do so. The only question here is,

whether, in point of fact, the presumption of authority in Lewis to bind his co-owner by his contract with the plaintiff for the repair of the vessel, which would arise from their relative position, is or is not rebutted by the circumstances. I had for some time entertained considerable doubt whether this was so or not. But I am now satisfied that it is not. I think there was no authority in point of law, and none in point of fact, to make the defendant liable. Undoubtedly, it might be that he had so conducted himself by previous dealings that the plaintiff might be justified in presuming that Lewis acted as his agent. There is no evidence at all here of any previous dealings, or proof of any circumstances from which it can be inferred that the defendant allowed Lewis to hold himself out in any way as his agent. After all, it comes to a mere question of fact; and that question, I think, must be decided in favor of the defendant.”<sup>1</sup> From considering the foregoing opinion, and that of the other Judges given in the same case, as well as the opinion expressed in an American case,<sup>2</sup> we conclude: 1st, that each part owner of a ship has the right to expect that the other part owners will concur with him in obtaining necessary supplies and in making necessary repairs; and that if he alone orders such supplies or repairs, they expressing no dissent, they as well as he will be liable therefor; 2d, that if any one of the part owners has notified the others that he will not join in making such repairs or procuring such supplies, he cannot be held responsible therefor; and 3d, that all persons dealing with a part owner must ascertain, at their own peril, whether the other part owners have, by a notice such as has just been referred to, revoked the implied authority under which each part owner is authorized to contract for all.

§ 385. The rights, remedies, and liabilities of part owners of ships among one another are, in general, identical with those of other tenants in common. As in case of other cotenants, the rights and remedies arising out of contracts between the part owners are controlled and enforced by the same rules of law which are applicable to other persons. In

<sup>1</sup> 17 Com. B. 120. See also *Revins v. Lewis*, 2 Paine, C. C. 202.

<sup>2</sup> *Stedman v. Feidler*, 20 N. Y. 441.

respect to torts committed by some of the part owners against the others, the law applicable to ordinary cotenancy seems to control in all respects. One cannot maintain an action of replevin against the other to recover possession of any part of their common property.<sup>1</sup> Neither can have trespass or trover, nor indeed any action, against the other under circumstances which would not justify the maintenance of such action between other tenants in common.<sup>2</sup> Therefore, one part owner of a ship "is not responsible to the co-owners for a careless use of it. The other owners, if not satisfied to leave it in his care, must look themselves to the protection of their own property."<sup>3</sup> This rule has been applied even where a vessel took fire and was totally consumed by the carelessness and inattention of a part owner in whose control it was.<sup>3</sup> This rule of the common law is, by Mr. Parsons, considered as technical rather than just; and he doubts whether it would be enforced in admiralty, as it finds no support in the civil law, which may be regarded "as the common law of courts of admiralty."<sup>4</sup> The settlement of claims between part owners of ships arising out of the common property must, as in case of other cotenants, be by a bill for an adjustment of accounts. Originally, equity had sole jurisdiction of such a bill,<sup>5</sup> and this is still true in the United States;<sup>6</sup> but in England jurisdiction has been given to courts of admiralty by statute.<sup>7</sup>

§ 386. **Liens of Part Owners.**—"There is much reason, and some authority, for giving to part owners a general lien on their common property for all their just and reasonable charges or balances of accounts against each other in relation

<sup>1</sup> Parsons on Shipping, 93; Barnes v. Bartlett, 15 Pick. 71.

<sup>2</sup> Maude & Pollock on Shipping, 73; Heath v. Hubbard, 4 East, 110; Mayhew v. Herrick, 7 Com. B. 229; MacLachlan on Shipping, 92; Ex parte Machell, 1 Rose. 447; S. C. 2 Ves. & B. 216; Barnardiston v. Chapman, 1 Geo. 1, now printed in 4 East, 121; Parsons on Shipping, 93; Graves v. Sawcer, T. Raym. 15; S. C. 1 Keb. 38; S. C. 1 Lev. 29; Strelly v. Winson, 1 Vern. 297; Milburn v. Guyther, 8 Gill, 92.

<sup>3</sup> Moody v. Buck, 1 Sandf. 304; Fleming on Shipping, sec. 399.

<sup>4</sup> Parsons on Shipping, 104.

<sup>5</sup> The Apollo, 1 Hagg. 306.

<sup>6</sup> Steamboat Orleans v. Phœbus, 11 Pet. 175; Grant v. Poillon, 20 How. U. S. 162; Kellum v. Emerson, 2 Curtis, C. C. 79; Minturn v. Maynard, 17 How. U. S. 477; Ward v. Thompson, 22 Id. 330.

<sup>7</sup> 24 Vict. ch. 10, sec. 8.

to their common property. Indeed, there might seem to be some reason for extending such a rule to all cases of cotenancy of chattels, but there is no authority whatever for it in respect to common chattels; and in regard to cotenancy in a ship, we have no doubt that the prevailing authority of the Courts, as well as the general usage of merchants, gives no such lien."<sup>1</sup> The authorities on this subject are no doubt conflicting; and that they are so is partly attributable to a conflict of opinion among the Judges, and partly to a want of attention to the distinction between part owners *as such* and part owners who happen also to be partners. Some confusion is also likely to arise from inattention to the material difference in the relations which the part owners sustain towards their ship and that which they sustain towards its earnings. While the ship is held by a tenancy in common, the earnings are usually treated as resulting from a special partnership, embracing the voyage or adventure from which they were realized.<sup>2</sup> Therefore, the freight or other proceeds of a voyage or other adventure must, if required by a part owner, be applied to the payment of the expenses of the outfit for the voyage or adventure, and to the expenses incurred in making such repairs as were necessary to enable the ship to perform the voyage; and not until these expenses are paid, can any of the part owners compel the payment to him of his proportion of the earnings of such voyage. In other words, any part owner making advances to pay such expenses has a right to retain or enforce repayment thereof out of the proceeds of the employment on account of which such expenses were necessarily incurred.<sup>3</sup> To this extent, a part owner may be said to have a lien for advances made by him. But even this lien—if such it may be called—has no existence in regard to the ship itself, unless, as to it, the relation and therefore the rights of copartnership exist. Hence, neither of the part owners has any lien against the

<sup>1</sup> 1 Parsons on Shipping, 114.

<sup>2</sup> *Holderness v. Shackels*, 8 Barn. & C. 612; *Ex parte Hill*, 1 Madd. 66; *Ex parte Young*, 2 Rose, 78, note; S. C. 2 Ves. & B. 242; *MacLachlan on Shipping*, 97; *Bovill v. Hammond*, 6 Barn. & C. 149.

<sup>3</sup> *Green v. Briggs*, 6 Hare Ch. 395; S. C. 12 Jur. 326; S. C. 17 L. J. Chanc. 323; *Mumford v. Nicoll*, 20 Johns. 611.

interest of another part owner for advances due the former from the latter on account of disbursements made in navigating<sup>1</sup> or in constructing<sup>2</sup> the ship. In view of all the decisions in reference to the liens of part owners of ships, Mr. Parsons concludes that "no principle will go so far in reconciling the leading cases on this subject as this: a part owner merely *as such*, has no lien whatever; but acquires such lien when any of the elements of partnership, or agency with bailment, upon which a lien may rest, enter into his relation with the other part owners."<sup>3</sup>

§ 387. **Actions against Third Persons.**—In prosecuting actions against third persons, part owners of a ship are subject to the rules laid down in the chapter on actions by co-tenants against third persons (§§ 328–372.) Whether the action be in contract or in tort—for services rendered by or for injuries done to their ship—all should join in its prosecution.<sup>4</sup> "The several part owners of a ship make in law but one owner; and in case of any injury done to their ship by the wrong or negligence of a stranger, they ought regularly to join in one action at law for the recovery of damages, which are afterwards to be divided among themselves according to their respective interests."<sup>5</sup> The cause of action accruing to part owners being joint, it follows that, on the death of one, it vests in the survivors, and that on the death of the last survivor, if the cause be capable of surviving further, it vests in his personal representatives.<sup>6</sup> But it seems, without joining the other part owners, a part owner

<sup>1</sup> *Green v. Briggs*, 6 Hare Ch. 395; S. C. 12 Jur. 326; S. C. 17 L. J. Chanc. 328; *Mumford v. Nicoll*, 20 Johns. 611. See also *The Larch*, 2 Curt. C. C. 427; *Ex parte Harrison*, 2 Rose, 76; *Maude & Pollock on Shipping*, 76; *Patton v. The Randolph*, 1 Gilpin, 457; *Mumford v. Nicoll*, 4 Johns. Ch. 522. Contra, *Pragoff v. Heslep*, 1 Am. L. Reg. 747; *Doddington v. Hallet*, 1 Ves. Sr. 497; *Seabrook v. Rose*, 2 Hill Ch. 553.

<sup>2</sup> *Braden v. Gardner*, 4 Pick. 456.

<sup>3</sup> 1 *Parsons on Shipping*, 115.

<sup>4</sup> *Flanders on Shipping*, sec. 392; *Patten v. Guernsey*, 17 Mass. 182; *White v. Curtis*, 35 Me. 534; *Robinson v. Cushing*, 11 Me. 480; *Parsons on Shipping*, 116; *Maude & Pollock on Shipping*, 80; *Coster v. N. Y. & E. R.R. Co.*, 6 Duer, 43.

<sup>5</sup> *Maclachlan on Shipping*, 114.

<sup>6</sup> *Maude & Pollock on Shipping*, 72; *Maclachlan on Shipping*, 114; *Rex v. Collector of Customs*, 2 Maule & S. 225; *Buckley v. Barber*, 6 Ex. 164; *Wright v. Marshall*, 3 Daly, 331.

may, by proceedings in admiralty, obtain possession of the ship from a fraudulent possessor. The following is the opinion delivered by Judge Curtis as presiding Judge of the Circuit Court of the United States, in the first circuit, in the case of the schooner *Friendship*: "Upon the proofs, it appears, in substance, that Haskell, the claimant, obtained his apparent title to one-half the vessel through a forged bill of sale; and that the libellant is the true and lawful owner thereof. And the question is, whether the other part owner, by failing to appear, can prevent his co-owner from trying his title as against a mere wrongdoer, and having established it, whether the Court will not, as against that wrongdoer, decree the possession to the libellant. I am of the opinion that it will try the title, and dispossess the fraudulent possessor, even in the absence of the other tenant in common. He has no interest in this dispute, and there is no reason for requiring him to be made a party to it. He may have no wish to have the possession changed; for he may be willing that whichever of these parties may be the true owner of a moiety should possess and manage the vessel. But I cannot presume from his mere silence, that he desires a fraudulent possession to continue, and if he did, I am not prepared to admit that it ought to affect the action of the Court. If this were a cause of possession, he, owning a moiety, would have an equal right to the possession if he chose to assert it. But it is a petitory action. The decree divests only the fraudulent and unlawful possession of the claimant. The real part owners will stand wholly unaffected thereby, as respects the employment of the vessel."<sup>1</sup>

§ 388. **Part Owners liable *in solido*.**—When the liability of part owners of ships *as such* to third persons "is established, each owner is by the law of England, which differs in this respect from the civil law, liable *in solido* for the whole amount of the debt, without reference to the proportion of his interest, or to any stipulations between himself and the other owners. So, the owners cannot qualify their

<sup>1</sup> 2 Curtis C. C. 426. In another American case, it seems to have been assumed that because part owners are not partners, each can sustain a separate action for his portion of the freight. *Magruder's Trustee v. Bowie*, 2 Cranch C. C. 577.



liability by any arrangement with their agents. Thus, where an owner agreed with his agent that the latter should pay for the repairs, on having the ship transferred to him, it was held that a creditor of the owner must look to him, and could not sue the agent. And if persons separately interested in aliquot parts of a ship employ a joint agent, they are, at law, liable each for the whole debt incurred. A court of equity would, however, distribute the liability rateably."<sup>1</sup> This rule of the English law is generally recognized and enforced in the United States;<sup>2</sup> but in Louisiana, part owners are not liable *in solido*, except where they are also partners.<sup>3</sup> "Insurers who accept an abandonment of a ship become thereby owners, and are liable as such, but not *in solido*; for if there be many insurers, each is liable only for his proportion, unless he promises to pay more. The reason of the exception is, that the ownership is in this case cast upon them by misfortune and necessity, and if not against their will, at least is not assumed by their free choice and voluntary action."<sup>4</sup>

§ 389. **Remedy where Part Owners disagree concerning Employment.**—It has already been stated that the chief difference between the law of an ordinary tenancy in common and that of a part ownership of ships arises from the interest which the public has in the advancement of commerce through the employment of ships. If all the part owners unite in wishing their property to remain idle instead of ploughing the seas the law will not interfere. But in case of a disagreement among them, they are not, like other cotenants, without remedy. They may disagree either in reference to what employment is most advantageous, or in reference to the advisability of seeking any employment whatever. In either case, the law has provided remedies calculated to preserve the

<sup>1</sup> Mande & Pollock on Shipping, 67, citing *Doddington v. Hallett*, 1 Ves. Sr. 498; *Thompson v. Finden*, 4 Car. & P. 158; 2 Bell's Comm. 655; *Rattenbury v. Fenton*, 3 Mylne & K. 505; *Passmore v. Bonsfield*, 1 Stark. 297; *British Empire Shipping Co. v. Some*, 1 E. B. & E. 353; affirmed 30 L. J. Q. B. 229.

<sup>2</sup> *Schemerhorn v. Loines*, 7 Johns. 311; *Muldon v. Whitlock*, 1 Cow. 290; *Gallatin v. The Pilot*, 2 Wall. Jr. 592; *Parsons on Shipping*, 100; *Flanders on Shipping*, 381.

<sup>3</sup> *Carroll v. Waters*, 9 Mart. 500; *David v. Elo*, 4 La. 106; *Burke v. Clarke*, 11 La. 206.

<sup>4</sup> *Parsons on Shipping*, 105; *United Ins. Co. v. Scott*, 1 Johns. 106.



rights and promote the interests of all the owners, and also to minister to the general interests and promote the general welfare of the public. These remedies are not, however, to be found in the courts of the common law, nor in the tribunals charged with the administration of the principles of equity jurisprudence.<sup>1</sup> They must be sought in the courts of admiralty. In these courts, "where part owners have entered into no express agreement by which the employment of the vessel is to be controlled, the law in favor of commerce will interpose, and compel obstinate and dissenting part owners to yield the property, to be employed by the majority in value, upon any probable design."<sup>2</sup> If one-half of the owners in value are in favor of employing the ship and the other one-half wish to have it idle, it seems that the law, as it favors the interests of commerce, will decide to send the ship forth in the employment.<sup>3</sup> If the part owners agree that the ship should be employed, but are equally divided in regard to the manner of its employment, it is doubtful whether the law has provided any means to relieve them from this predicament.<sup>4</sup> If a majority in value of the part owners are unwilling to employ the ship, the minority may compel its employment by the same means and upon the same conditions as are available to the majority when they wish to employ it and the minority dissent.<sup>4</sup>

§ 390. **Security for Return of Ship.**—Mr. Abbott, after considering the various laws and ordinances of different nations in regard to the rights of part owners in case of their disagreement as to the employment of their ship, says: "The law of this country seems to possess an important advantage over all the ordinances that have been cited; because, while it authorizes the majority in value to employ the ship 'upon any probable design,' it takes care to secure the interest of the dissentient minority from being lost in the employment of which they disapprove. And for this purpose, it has been the practice of the Court of Admiralty from very remote

<sup>1</sup> Parsons on Partnership, 558; *Castelli v. Cook*, 7 Hare, 89.

<sup>2</sup> Flanders on Shipping, sec. 365.

<sup>3</sup> Story on Partnership, sec. 435; Flanders on Shipping, sec. 367.

<sup>4</sup> *Steamboat Orleans v. Phœbus*, 11 Pet. 183; *Tunno v. The Betaina*, 5 Am. L. R. 406.

times to take a stipulation from those who desire to send a ship on a voyage, in a sum equal to the value of the shares of those who disapprove of the adventure, either to bring back and restore to them the ship, or to pay them the value of their shares. When this is done, the dissentient part owners bear no proportion of the expenses of the outfit, and are not entitled to a share in the proceeds of the undertaking; but the ship sails wholly at the charge and risk, and for the profit of the others. This security may be taken upon a warrant obtained by the minority to arrest the ship, and it is incumbent on the minority to have recourse to such proceedings as the best means of protecting their interests; or, if they forbear to do so, at all events, they should expressly notify their dissent to the others, and, if possible, to the merchants who freight the ship. For it has been decided that one part owner cannot recover damages against another by an action at law upon a charge of fraudulently and deceitfully sending the ship to foreign parts, where she was lost. And it has also been decided in the Court of Chancery, that one part owner cannot have redress in equity against another for the loss of a ship sent to sea without his assent.”<sup>1</sup> The bail-bond taken for the benefit of the dissenting part owners “contemplates no other object than the safe return of the vessel, or, in default thereof, the payment of the stipulated sum. That is the whole extent of the transaction upon which the parties and the Court are acting in this process. No other object is proposed, and there is no case, either within the scope of my own inquiry, or which has been discovered by the diligence of the advocates, upon repeated challenges given them for that purpose, in which the Court has moved beyond those limits.”<sup>2</sup> When, therefore, the security has been given under directions of a Court of Admiralty, and it thereafter appears to the Court that the vessel was sent upon the voyage and was lost, the Court will enforce the immediate payment of the sum stipulated in the bond, and will not consider any

<sup>1</sup> Abbott on Shipping, 99, citing *Graves v. Sawcer*, T. Raym. 15; *Strelley v. Wilson*, 1 Vern. 297. See as to authority to arrest the ship at the instance of the dissenting part owners, and to compel the majority to give security for its safe return, *In the Matter of Blanshard*, 2 Barn. & C. 244; *The Apollo*, 1 Hagg. Ad. 310.

<sup>2</sup> Lord Stowell in *The Apollo*, 1 Hagg. Ad. 312.

claims or offsets presented by the majority, and alleged to have arisen from the misconduct or misrepresentations of the minority.<sup>1</sup>

§ 391. **Compulsory Sale, denied in England.**—But notwithstanding all the pride manifested by writers upon the maritime law of England, in the superior remedies afforded by that law and confided to Courts of Admiralty, designed to ameliorate the condition of dissentious cotenants, it is by no means certain that they are not left in a more unfortunate or at least a more helpless situation than at the common law. It is true that a part owner, fearful that his property is about to be sent upon some dangerous employment, may arrest it and rescue it from the proposed peril, or at least obtain security sufficient to indemnify him in case of its loss. It is also certain that the majority in value may compel the possession of the ship to be delivered to them in order that they may devote it to any usual and legitimate employment. But that part of the law intended to secure the interest of the minority secures it very inefficiently, and is easily evaded. The value of the use of the ship ought to be as much the subject of legal care and solicitude as the value of the ship itself. But the security exacted by the Courts of Admiralty from the majority who are about to send the ship on a hazardous adventure does not include anything but the value of the interests of the dissenting part owners. If the ship should ever return, or whether it returns or not, the minority have no interest in its actual earnings, and no compensation for what its use is reasonably worth.<sup>2</sup> They are thus compelled either to assent to the hazardous employment or to forego all expectation of profit from their property. So, when the majority wish the vessel to remain idle, although it is said that the law, acting for the advancement of commerce, will allow the minority to take and employ the vessel, upon giving adequate security for its safe return, yet, conceding this to be true, the law is easily evaded. The majority have but to propose to send the vessel upon some useless or dangerous voyage,

<sup>1</sup> Lord Stowell in *The Apollo*, 1 Hagg. Ad. 312.

<sup>2</sup> *The Marengo*, 1 Low. Dec. 52; S. C. 1 Am. L. R. 88; *Willings v. Blight*, 2 Pet. Ad. 288.

to which the minority would not assent. It would then appear that the owners disagreed in reference to the *mode* of employment, and the minority would be without redress. But it is self-evident that when several persons whose relations require them to have constant business intercourse with one another once become dissentious, nothing can so effectively relieve them from their embarrassment as a permanent dissolution of those relations. Cotenants unable to agree upon the management of their common property may divide it; and if unable to agree upon a division, they may call upon some legal or equitable tribunal to divide it for them. A ship is incapable of partition. If dissentious part owners have any effective and permanent means of relief, it must be through a sale of the vessel and a division of the proceeds. But the majority may be well contented with the advantages of their position, and may refuse to unite in a sale. It is clear that the English Courts of Admiralty will not, in any case, compel a part owner to sell his share.<sup>1</sup> The rule of these Courts upon this subject, and the reasons on which it is founded, were thus stated by Sir Christopher Robinson in pronouncing a judgment in the High Court of Admiralty: "The law of some countries has gone so far as to endeavor to compromise all interests by compelling, in cases of disagreement, a sale, either of the shares of the minority or of the whole ship, at the application of the majority of the owners, and sometimes even of a moiety of interests. Such attempts appear to have been made also in this country; but the justice of such a proceeding may be questionable. Disagreements may be fomented by it; or a forced sale at particular times may be disadvantageous or ruinous to the minority. The law of England has accordingly restrained the Court of Admiralty from exercising such an authority; and no other Court has assumed it. On the contrary, the Courts of common law and of chancery have declined to interfere between joint-tenants in respect to the possession of their ship."<sup>2</sup>

<sup>1</sup> *Ousten v. Hebden*, 1 Wils. 101; *Maclachlan on Shipping*, 96; *The Apollo*, 1 Hagg. Ad. 806; *Maude & Pollock on Shipping*, 78; *Parsons on Partnership*, 561.

<sup>2</sup> *The Margaret*, 2 Hagg. Ad. 276.

§ 392. **Compulsory Sale in America.**—The American Courts have generally dissented from those of the mother country in declining to order a sale on account of a disagreement among the part owners, and “the decided weight of authority,” if the American cases alone were to be consulted, would be “in favor of the power of admiralty to decree a sale.”<sup>1</sup> This power is not, however, called in being except where the maritime law has furnished no means of deciding between the part owners. It is therefore only to be exercised when the part owners are equally divided in regard to the employment to which they shall devote their ship, or in regard to some other matter which must be decided before the ship can be employed. This question was first directly involved and decided in the United States Courts in the year 1828, when Judge Hopkinson, in the District Court for the Eastern District of Pennsylvania, held that he had no authority to decree a sale, although there were but two part owners and they were unable to agree.<sup>2</sup> But the judgment of the District Court was reversed in the Circuit Court presided over by Justice Washington.<sup>3</sup> In this case the disagreement of the part owners was not in regard to the employment of the ship, but as to who should be master, the owner of one-half of the vessel insisting that she should sail under his control as master, and the owners of the other half being dissatisfied with his management, and determined that he should no longer control the ship. “If we come to a closer examination and summary of the maritime law upon this question, we shall arrive at these results: A vessel, although the subject of private ownership, is regarded as a matter also of public interest. The public interest is protected in securing the employment of the vessel. In the management of a vessel, the opinion of the majority in value shall prevail, unless it forbids its employment, in which case it yields to the majority desiring its employment. The sale of a vessel is not encouraged, because the interference of the Court in aiding a discontented part owner to force a sale would, in many

<sup>1</sup> Parsons on Partnership, 561.

<sup>2</sup> Davis v. The Seneca, Gilp. 10.

<sup>3</sup> Davis v. The Seneca, 18 Am. Jur. 486; S. O. 3 Wall. Jr. 395; S. C. 6 Penn. L. J. 213.

cases, serve only to gratify caprice or passion, tend to the injury of other part owners, and invite frequent and injurious interruptions of commercial operations. In case of a disagreement between part owners who have an equal interest concerning the employment of the vessel, a sale will be ordered, but such disagreement must not be upon the question of employment or not, for in such case they who desire to employ shall prevail, but it must be a disagreement as to the manner in which the vessel shall be employed. \* \* \* \* \*

The power to sell, as exercised by Judge Washington, in the case of the *Seneca*, was carried as far as the best authorities in the maritime law will warrant. Nor is it easy to comprehend for what useful purpose the power could be exercised, in any other cases than such as I have referred to, in which a disagreement between the part owners cannot be determined by the application of the principles of associated ownership, or such as are specially provided for an ownership in vessels. Of what use would be the principle which affirms the control resulting to a majority from the fact of its being so, if in any case in which it was to be applied, a Court would be asked to decree a sale? It would soon be that the only mode of preventing a dissolution would be for the majority to render unquestioning accord to the wishes of the minority, no matter how small the minority or how unreasonable its exactions."<sup>1</sup> The difference between the American and the English decisions, in regard to the power of Courts of Admiralty to decree a sale in case of a disagreement between part owners for the settlement of which no rules of law have been provided, does not result from a diverse interpretation of English law, nor yet from the enactment of any American statute directly controlling the question, but from the fact that the American Courts conceive that their "jurisdiction, and the law regulating its exercise, are to be sought for in the *general maritime law of nations*, and are not confined to that of England, or of any other particular maritime nation."<sup>2</sup>

<sup>1</sup> *Tunno v. The Betsina*, 5 Am. L. Reg. 406.

<sup>2</sup> *Davis v. The Seneca*, 18 Am. Jur. 486; S. C. 8 Wall. Jr. 395.



# **PARTITION.**





## CHAPTER XVIII

### VOLUNTARY PARTITION.

- Introductory Definitions and Observations, § 393.**  
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§ 393. **Introductory Definitions and Observations.**— Ordinary cotenants, unlike part owners of a ship, have ample means of terminating their property relations with one another, and of thus avoiding a continuance of that discord and irritation which must necessarily attend an association compelled by interest, but reprobated by every other consideration. Cotenants no longer content to enjoy their property in moieties may, if it be susceptible of division, have it transformed

into estates in severalty, and one of such estates assigned to each of the former occupants for his sole use, and as his sole property. Or if one only be discontented, the others may assign him a portion, equivalent to his interest, to be by him thereafter held and enjoyed in severalty, leaving the other cotenants to hold the residue by moieties and under the same kind of cotenancy by which they had before held their moieties of the whole.<sup>1</sup> If the cotenants be unable to agree upon any division of their common property, or even when they have made no effort to agree, any one of them may, by proceedings instituted at law or in equity, compel a division, or if a division be impossible or incapable of accomplishment except by greatly prejudicing the interests of the cotenants, a sale of the whole property may, at the present day, be compelled, in order that the proceeds may be distributed among all the cotenants according to their respective interests. By whichever of these means the cotenancy is terminated and the interests of some or all of the cotenants dissevered from that of the others, the proceeding is, at the present day, usually called a partition. Mr. Allnatt, in his introductory observations to his *Treatise on the Law of Partition*, says: "The partition of which I propose to treat, is a division of lands or tenements, by coparceners, joint-tenants, or tenants in common, so as to put an end to the cotenancy, and to vest in each person a sole estate in a specific purparty, or allotment of the lands or tenements. Partition, in its primitive and technical import, signified such a division by coparceners or coheirs of lands which had descended by common law or by custom; and the books, when they speak of partition generally, and without alluding to the particular species of undivided estate in the parties making it, appear invariably to mean a partition by coparceners—a circumstance which the student will find it necessary to keep in his mind while investigating the subject. But, for reasons which will appear in the course of our inquiry, the term has long since become equally applicable to a division of lands by joint-tenants or tenants in common."<sup>2</sup>

<sup>1</sup> Vin. Abr, Tit. Partition (A. 2, sub. 5); Litt. sec. 276.

<sup>2</sup> Allnatt on Partition. 1.

The partition of which Mr. Allnatt in fact treated, included, in addition to the matters enumerated in his introductory observations, the consideration of forms of partition in which it is evident that the cotenancy was not terminated by vesting in either cotenant a sole estate in any specific purparty. For, in some instances, such an allotment was either impossible or so injurious that neither of the cotenants would consent to it. In such cases, while no actual division could be made of the subject of the tenancy, it was possible to agree upon some plan by which the beneficial enjoyment could be shared equally yet severally by the cotenants. "For instance, if an agreement be made between coparceners, that the one shall have and occupy the land from Easter until the first of August only, in severalty, and that the other shall have and occupy the land from the first of August until Easter, yearly, to them and their heirs, this is a good partition. Also, if two coparceners have two manors by descent, and they make partition that the one shall have the one manor for one year or longer, and the other the other manor for a similar period, *alternis vicibus*, to them and their heirs, this is a good partition. In this case, each coparcener has an estate of inheritance, and not a mere chattel interest, although they have the occupation by turns for a certain term of years."<sup>1</sup> So "though an advowson is in itself entire, and a partition could not make two advowsons out of one, yet it may be divided so that the parceners may present by turns. However, such a partition by coparceners was held to be only a partition of the presentation; for the advowson continued in coparcenary, and they must all have joined after such partition in a writ of right of advowsons."<sup>2</sup> There were also, at the common law, many other instances of indivisible inheritances, in which the only partition that could be made consisted either of an enjoyment in severalty by turns, or a division of the proceeds or profits.<sup>3</sup> The embarrassment which, at the common law, attended the partition of indivisible inheritances has been obviated by statutory provisions authorizing Courts to direct a sale of the common property whenever it is not capable of

<sup>1</sup> Allnatt on Partition, 4; Vin. Abr. Tit. Partition (A. 2.)

<sup>2</sup> Allnatt on Partition, 6, 7.

<sup>3</sup> Ib. 8, 9; Co. Litt. 164 b, 165 a.

an advantageous allotment. This renders it essential that we should treat of a subject not embraced in Mr. Allnatt's work, viz., of the circumstances in which a sale will be preferred to an allotment, the manner of conducting such sale, and its effect when properly conducted. We shall also treat of the partition of personal property, a subject not embraced in Mr. Allnatt's work.

§ 394. **Voluntary Partition, and Devices for making the Allotments therein.**—A partition is either voluntary or compulsory. It is voluntary when accomplished by the cotenants by mutual agreement between one another; and is compulsory when effected by a Court having competent jurisdiction for that purpose, acting at the instance of one or more of the cotenants.<sup>1</sup> Voluntary partition between coparceners at common law was accomplished by one of four different methods. By the first method, the parceners by direct agreement between one another made their partition, and each took a particular part to hold in severalty. Littleton intimates that each part must be of equal value;<sup>2</sup> but in commenting upon this Lord Coke observes: “If coparceners make partition at full age and unmarried, and of *sane memorie*, of lands in fee-simple, it is good and firme for ever, albeit the values be unequall; but if it be of lands entailed, or if any of the parceners be of *non sane memorie*, it shall binde the parties themselves, but not their issues unlesse it be equall; or if any be covert, it shall bind the husband but not the wife or her heires, or if any be within age, it shall not bind the infant.”<sup>3</sup> By the second method, the coparceners first appointed some of their friends to divide the lands into equal parts. After such division had been made, each of the coparceners selected one of these parts to hold in severalty. In this selection, the eldest sister had the first choice, and the others chose after her according to their seniority.<sup>4</sup> When the third method was employed, the eldest sister was chosen to make division of the lands into equal parts. In this case, to assure the impartial exercise of her judgment, “it is said the eldest sister shall choose last for

<sup>1</sup> Allnatt on Partition, 2; Co. Litt. 165 b.

<sup>2</sup> Litt. sec. 243.

<sup>3</sup> Co. Litt. 166 a.

<sup>4</sup> Litt. sec. 244; 2 Cruise, 304.

her part, and after every one of her sisters.”<sup>1</sup> “The rule of law is, *cujus est divisio, alterius est electio*. And the reason of the law is, for avoyding partiality.”<sup>2</sup> The fourth method of voluntary “partition or allotment is, as if there be four parceners, and after partition of the lands be made, every part of the land by itself is written in a little scrowle and is covered all in waxe in manner of a little ball, so as none may see the scrowle, and then the four balls of waxe are put in a hat to be kept in the hands of an indifferent man, and then the eldest daughter shall first put her hand into the hat, and take a ball of waxe with the scrowle within the same ball for her part, and then the second sister shall put her hand into the hat and take another, the 3 sister the 3 ball, and the 4 sister the 4 ball, &c., and in this case every one of them ought to stand to their chance and allotment.”<sup>3</sup>

§ 395. **Partition by Arbitration.**—When the cotenants appoint certain persons as arbitrators, or commissioners to make partition for them, it is not usually understood that their award or report operates upon the legal title. “It has, indeed, been said, that partition cannot be made by award, since a freehold cannot pass without livery; but this position

<sup>1</sup> Litt. sec. 245; 2 Cruise, 394.

<sup>2</sup> Co. Litt. 166 b.

<sup>3</sup> Litt. sec. 246; 2 Cruise, 395. The division of land by lot naturally suggests itself as the most simple as well as the most impartial method which can be employed. It is also likely to prove as satisfactory as any other method, because it is more likely than any other to present to the parties interested the appearance of the utmost fairness, and to leave them without evidence of intentional injustice. It was frequently employed by the Israelites. Thus, when Moses on the plains of Moab had numbered the children of Israel, the Lord spake unto him saying: “Unto these the land shall be divided for an inheritance according to the number of names. To many thou shalt give the more inheritance, and to few thou shalt give the less inheritance: to every one shall his inheritance be given according to those that were numbered of him. Notwithstanding the land shall be divided by lot: according to the names of the tribes of their fathers they shall inherit. According to the lot shall the possession thereof be divided between many and few.” (Numbers, ch. 26, v. 52–56.) And when the Lord commanded the children of Israel to drive out the inhabitants of the land of Canaan, he again directed that the land should be divided among the families of the Israelites by lot. (Ib. ch. 33, v. 54.) And whenever it became necessary to divide a new acquisition among the children of Israel, the original command to divide by lot was either repeated or enforced without repetition. (Ezek. ch. 48, v. 29; ch. 47, v. 22; Jos. ch. 18, v. 6; 1 Chron. ch. 24, v. 5; ch. 16, v. 18; Acts, ch. 13, v. 19.) No doubt the same method was employed in reference to personal property to which several were equally entitled. Hence we find that the soldiers after crucifying Jesus “parted his garments, casting lots upon them, what every man should take.” (Mark, ch. 15, v. 24.)

must be understood as referring to the actual operation of the award itself."<sup>1</sup> When several tenants in common covenanted by deed to submit to an award to be made by certain arbitrators, partitioning the lands of the cotenancy, and an award was accordingly made allotting the lands in severalty among the cotenants, such award was held to be incomplete until confirmed by conveyances executed in accordance with it.<sup>2</sup> But it seems that when the cotenants refuse to make the conveyances necessary to transfer the legal title, equity will compel them to do so.<sup>3</sup> A deed of partition may appoint certain persons as commissioners to make a division of the lands therein described, and to allot the same among the cotenants according to certain terms specified in the deed. If, in addition to these provisions, the deed contains words of release and conveyance by which the several cotenants mutually convey and release to each other the parts which may be allotted to each respectively by the commissioner—the deed to take effect when the commissioners file their report in the Recorder's office, with a map showing the boundaries of the several allotments—such deed is a deed on condition precedent, and upon the happening of the condition, namely, the filing of the report and map, the deed becomes effectual as a deed of partition and release, and vests in each cotenant in severalty both the legal and equitable title to the premises allotted to him by the commissioners.<sup>4</sup>

§ 396. **Of the Necessity of Conveyances.**—In the preceding section, we have shown that a voluntary partition between coparceners was, at common law, usually accomplished by one of four different methods. But each of these methods is to be regarded rather as a device resorted to for the purpose of ascertaining how an allotment should be made, than as a means of transforming a title held in moieties into two or more titles to be held in severalty. We have yet to consider what means are necessary, after the allotment has been determined, to vest an exclusive title to each purparty in the cotenant to whom it has been allotted. In the case of joint-tenants, voluntary "partitions must, at

<sup>1</sup> Allnatt on Partition, 17, 18.

<sup>2</sup> Knight v. Burton, 6 Mod. 231.

<sup>3</sup> Johnson v. Wilson, Willes, 248.

<sup>4</sup> Tewksbury v. Provizzo, 12 Cal. 23.

all times, have been *by deed*; except where the estate was only for years, for there they might make partition without deed."<sup>1</sup> Between tenants in common, a voluntary partition could, by the common law, be made by parol, provided it was executed in severalty with livery of seisin.<sup>2</sup> "If two tenants in common be, and they make partition by paroll, and execute the same in severalty by livery, this is good and sufficient in law."<sup>3</sup> "Partition by agreement between parceners may be made by law between them, as well by parol without deed, as by deed;"<sup>4</sup> and need not be perfected by livery.<sup>5</sup> These distinctions are recognized in all the elementary works upon the common law; but it is difficult to satisfactorily account for them, or to show that they arose from corresponding differences in either the origin, the character, or the objects of the cotenacies to which they were attached. In attempting to explain and justify them, Mr. Allnatt, in his treatise on Partition said: "Partition between coparceners neither amounts to, nor requires, an actual conveyance. It is less than a grant. Its operation is not to pass the land by a fresh investiture of the seisin, for parceners are supposed to be already in possession of the whole lands. Partition, therefore, makes no degree. It only adjusts the different rights of the parties to the *possession*; each does not take her allotment by *purchase*; but is seized of it by descent from the common ancestor, as she was of her undivided share before partition. At common law, therefore, a partition among parceners by *parol* was legal and efficacious, though they might make a valid partition by deed; and a partition by *release* with warranty from one to the other is expressly mentioned in the books as good. Sir W. Blackstone, in his Commentaries, seems to attribute this efficacy of a parol partition to the parceners being always, at common law, subject to coercive partition by writ. But Hawkins, in his abridgement of Coke upon Littleton, states the reason to be, that partitions between parceners were much favored and privileged, because

<sup>1</sup> 2 Cruise, 384; Co. Litt. 187 a; 13 Petersdorff's Abr. 137, 141; Vin. Ab. Tit. Partition (D.)

<sup>2</sup> 2 Cruise, 410.

<sup>3</sup> Co. Litt. 169 a.

<sup>4</sup> Litt. sec. 250; Vin. Ab. Tit. Partition (C.)

<sup>5</sup> 2 Cruise, 395.



their undivided estate was created and cast on them merely by act of law. And this, perhaps, is the more rational and satisfactory way of accounting for the circumstance. \* \* \* The author of the Commentaries, after defining a partition between joint-tenants, coparceners, and tenants in common, says: 'Here, as in some instances there is a unity of interest, and in all a unity of possession, it is necessary that they all mutually *convey and assure* to each other the several estates which they are to take and enjoy separately. By the common law, parceners, being compellable to make partition, might have made it by parol only; but joint-tenants, and tenants in common, must have done it by *deed*; and in *both* cases, the conveyance must have been perfected by livery of seisin.' And he cites the above noticed section of Litt. (250,) and Co. Litt. 169. However, these authorities by no means bear out the learned commentator in the positions contained in this paragraph; and indeed they expressly contradict him in the assertion that tenants in common must have made partition by *deed*. And with respect to joint-tenants, a consideration of the nature of their estate will sufficiently prove that the learned author must have also been mistaken in stating that a partition by them must have been perfected by livery of seisin. A joint-tenant is seised *per mie et per tout*. As far as regards the enjoyment of profits, indeed, he has only a share; but his possession in the eye of the law runs through and pervades the whole lands. He cannot, therefore, take by livery any part of the lands, because he is already in possession of them. He and his companions all come in by the same feudal contract; and a second feoffment cannot give any farther title or notoriety, because every person is supposed to be in by his elder title, which, in the case of joint-tenants, is the original conveyance. The proper mode of assurance between joint-tenants is by *release*, which enures by way of *mitter l'estate*, and which could not have been effected without *deed*. By such release, a fee will pass to the releasee, without words of limitation; for the releasee is in by the original conveyance, and such release is not considered as an alienation, nor does it make a degree.

But in regard to *tenants in common*, they have several and

distinct freeholds, and may *enfeoff* each other; because this estate, being established by different notorieties, and each moiety having passed by a distinct livery, they must convey to each other by a distinguishing livery. But the same reason which requires an *actual conveyance* between them shows that a *release* to each other would be invalid, as a release assumes the party to be already in possession."<sup>1</sup>

§ 397. **Parol Partitions said to be invalidated by Statute of Frauds.**—A voluntary partition of lands could, as we have shown, be made by parol at the common law between parceners and also between tenants in common. But, according to a slight preponderance of American cases, and to a decided majority of the English authorities,<sup>2</sup> the Statute of Frauds now interposes an insuperable obstacle to a valid parol partition. It must not however be inferred that, even under these authorities, parol evidence may not, under certain circumstances, be competent to establish a partition; but it can only be so when its purport is such as to directly establish that a partition was made in some valid method, the written evidence of which cannot now be produced. If a jury be called upon to determine, as an issue of fact, whether or not a partition of lands once held in cotenancy had been effected, and the undivided estates of the cotenants thereby changed into estates in severalty, evidence might properly be admitted showing a several occupation of some specified part by each of the cotenants for a long period of time, and the jury might be justified from such evidence in inferring that a valid partition had been made. But if this long-continued possession in severalty be explained, and be shown to have existed in pursuance of a parol partition made by the cotenants, the inference which might otherwise be indulged is rebutted, and the jury would, according to the authorities to which we have referred, not be justified in finding that a valid partition had been consummated. The cotenants would, therefore, notwithstanding their several occupation, be still

<sup>1</sup> Allnatt on Partition, 124-129.

<sup>2</sup> Johnson v. Wilson, Willes, 248; Ireland v. Rittle, 1 Atk. 541; Whaley v. Dawson, 2 Sch. & Lef. 367; Browne on St. of Frauds, sec. 68; 2 Black. Comm. 328; Allnatt on Partition, 180; 13 Petersdorff's Ab. 141; 1 Chitty's Genl. Pr. 313.

regarded and treated as owners of undivided moieties.<sup>1</sup> In an early case in Massachusetts, it appeared that a several possession had been continuously maintained for twenty-seven years; and the cotenants had been heard to declare that they had made a partition, but without expressing whether such partition had been made by deed or by parol. Upon these facts, Chief Justice Parsons said: "Since the statute of frauds, partition by parol is void. But a several possession may be the consequence of a parol partition. We cannot therefore infer, from the severance of the possession by the tenants in common, that a partition by deed was executed. Whether a deed of partition was or was not executed, is a question of fact, and not of law; and it is improperly submitted to us as a question of law."<sup>2</sup> Chief Justice Hornblower, of the Supreme Court of New Jersey, while intimating that he might possibly uphold a parol partition when sanctioned by long-continued possession taken and held by virtue of it, denied the force of such partition when accompanied by possession for a period of five or six years, and thus portrayed the evils which, in his judgment, were likely to arise from encouraging parol partitions: "The peace of society and the security of titles, under the existing circumstances of our country and the policy of our laws, in my opinion, strongly require an adherence to the rule, that all partitions of freehold estates among cotenants should be by deed or writing. By our laws of inheritance, and the prevailing habits of society, the land of almost every decedent, whether testate or intestate, comes to be divided and subdivided among his children and grandchildren. Lands are now almost as much an article of sale and transfer as merchandize itself. It is the interest and policy of the country that it should be so; and the same interest and policy require certainty, and security to be given to titles. But if partitions may be made by parol, and if not only the fact of

<sup>1</sup> *Porter v. Hill*, 9 Mass. 34; *Dow v. Jewell*, 18 N. H. 353; *Wright v. Cane*, 18 La. An. 579; *Craig v. Taylor*, 6 B. Monr. 459; *Lacy v. Overton*, 2 A. K. Marsh. 442; *Wood v. Griffin*, 46 N. H. 237; *Ballou v. Hale*, 47 N. H. 350; *Anders v. Anders*, 2 Dev. 531; *McPherson v. Seguire*, 3 Dev. 154; *Richman v. Baldwin*, 1 Zab. 395; *Goodhue v. Barnwell*, Rice Eq. 198.

<sup>2</sup> *Porter v. Perkins*, 5 Mass. 235.

such partition having been made and understandingly agreed to by all the parties, but the time when the partition lines, the metes and bounds, courses and distances of the several parcels allotted to each, are all to rest in the frail memory of man: if no records or writings are to be made of such partitions, to which purchasers and heirs are to resort for information and certainty, it will not only depreciate the value of real estate derived under such partitions, by rendering titles uncertain and precarious, but, in the end, be productive of fruitful litigation.”<sup>1</sup> In *Maine, Knight and Duncan*, two tenants in common, made a parol partition of their lands. Each took and held exclusive possession of the part allotted to him, and each subsequently conveyed, with covenants of warranty, the part assigned to him, to a stranger to the cotenancy. About fifteen years after the parol partition, Duncan petitioned the Court for a partition of part of the lands, and the Court held that “neither the parol partition, nor the subsequent corresponding occupation, nor the conveyance by each of the purparty assigned to him, operated as an effectual legal partition. Knight and the petitioner were seized *per mi et per tout*, and neither could invest the other with a separate title to a portion of the tract, without the formality of a deed. Each therefore may avoid the conveyance of the other, so that it may not interpose an obstacle to a just and equal partition. The tenancy in common embracing the whole tract, neither can, by his own act, exclude the other from any part of it.”<sup>2</sup>

§ 398. **Parol Partitions upheld notwithstanding Statute of Frauds.**—In New York, more frequently than elsewhere, the validity of parol partitions, when succeeded by possession taken and held thereunder, has been considered and affirmed. In the first case which arose in this State directly involving this question, Chancellor Kent, then Chief Justice of the Supreme Court, said: “A parol division, carried into effect by possessions taken according to it, will be sufficient to sever the possessions, as between tenants in common whose titles are distinct, and where the only object of the division is to

<sup>1</sup> Den ex dem. *Woodhull v. Longstreet*, 3 Harr. (18 N. J. Law) 414.

<sup>2</sup> *Duncan v. Sylvester*, 16 Me. 390; *Cheney v. Dale*, 39 Me. 164.

ascertain the separate possessions of each. This was so admitted by the Court in the case of *Jackson ex dem. Vandenberg v. Bradt*, 2 Cai. 174."<sup>1</sup> But the case to which the Chief Justice thus referred does not, as reported, warrant the statement which he made; because the parol partition had been confirmed by a deed in which the cotenants covenanted to abide by it. A few years later, the same Court said: "There is no doubt but that, where the *title* is admitted to have been in common, a parol partition, followed up by *possession* will be valid, and sufficient to sever the possession."<sup>2</sup> The principles thus announced have ever since been frequently and consistently applied in the same State,<sup>3</sup> but we have been unable to discover any case in that State in which the effect of the statutes of frauds upon parol partitions has been described, or in which the Courts have, in any respect, viewed the effect of such partition except by the light of *stare decisis*. In Mississippi, after explaining the nature and object of certain testimony which had been rejected by a subordinate Court, the High Court of Errors and Appeals, expressed its opinion in the following brief but emphatic language: "The only question, then, upon which the competency of this evidence depends, is, whether it is competent to show a partition by parol between coparceners or tenants in common. And there can be no doubt but that such an agreement, when carried out by the parties taking possession in severalty, is valid, and effectual to conclude the rights of the others against the respective parties so holding in severalty."<sup>4</sup> In Pennsylvania, in an action for partition, the defendant pleaded *non tenent insimul*; and at the trial offered parol evidence to show that the plaintiff and himself "before the institution of the suit, had agreed to make partition, and that accordingly they met upon the ground, and with the assistance of a surveyor, mutually employed by them, they ran and distinctly marked a line of partition, and actually made division of the land by

<sup>1</sup> *Jackson v. Harder*, 4 Johns. 212.

<sup>2</sup> *Jackson v. Vosburgh*, 9 Johns. 276.

<sup>3</sup> *Mount v. Morton*, 20 Barb. 138; *Otis v. Cusack*, 43 Barb. 549; *Conkling v. Brown*, 57 Barb. 265; *Ryerss v. Wheeler*, 25 Wend. 434; *Jackson v. Christman*, 4 Wend. 277; *Wood v. Fleet*, 36 N. Y. 499.

<sup>4</sup> *Willey v. Bonney's Lessee*, 31 Miss. 652; *Natchez v. Vandervelde*, Ib. 706.

each taking possession of the part allotted to him by the other, which had been so held in severalty ever since. This evidence was overruled by the Court, and a bill of exceptions sealed," upon which the case was argued in the Supreme Court. Tilghman, C. J., delivered the following opinion of the Court: "The defendant in error contends that the evidence ought not to have been admitted—1st, because the partition was made by parol; 2d, because if it had been in writing, it was not admissible on the issue joined, but ought to have been specially pleaded. The first objection is founded on the act of Assembly of 21st March, 1772, by which a writing is made necessary for the passing of any estate or interest in lands. This act of Assembly, so far as respects the point under consideration, is in substance the same as the English statute of frauds and perjuries; in the construction of which it has been determined that specific execution of a parol agreement shall be decreed in equity, when the agreement has been carried into effect in part only. This determination was founded on two principles: 1st, that where the parties have acted on their agreement, there is no danger of perjury in proving it; and 2d, because it is against equity that a man should refuse to perfect an agreement from which he had derived benefit by execution in part. Whether the courts of chancery have gone further than they ought, in thus indirectly giving efficacy to a parol agreement concerning land, we do not think ourselves at liberty now to inquire; because the principles I have mentioned have been adopted by this Court, and long considered as the law of the land; and to question them now, would shake many titles acquired under their authority. We therefore think ourselves bound to say that the evidence offered ought to have been received, unless it was improper because not applicable to the issue joined; which is the second point for consideration.

"The plaintiff below declared that he and the defendant held the land *together* and undivided: the defendant pleaded that they did not hold it *together*; and this was the point of the issue. Now, what was the evidence offered by the defendant? Why, that he and the plaintiff had made partition, which was in direct affirmance of his plea, that they did not hold together; because if they held in severalty, they could

not hold together. We are of opinion, therefore, that the evidence offered by the defendant below ought to have been received."<sup>1</sup> The principles thus announced, so far as they relate to the effect of a parol partition, have been repeatedly reaffirmed in the same State.<sup>2</sup> In South Carolina, in a case where parol partition had not been consummated by possession taken and held in accordance therewith, the Court said: "There is no doubt, that if actual possession had followed the partition, it would have bound the parties."<sup>3</sup> In so saying, the Court but confirmed the following intimation made by Judge Brevard many years previously in delivering the opinion of the Constitutional Court of the same State: "A parol agreement and partition was good at common law. And notwithstanding the statute of frauds may, perhaps, still be considered valid, if the line of partition on the ground be sufficiently marked and manifested by a correspondent separate and distinct possession, for a sufficient length of time."<sup>4</sup> In Virginia, "between parceners, deeds of partition, though the better practice, are not absolutely necessary: they may mark and establish the dividing line between them, and prove it by any other competent evidence; and they will, from the time of marking and establishing the line, be seized in severalty."<sup>5</sup> The validity of a parol partition executed by taking and holding possession under it, seems to have been conceded at one time in Missouri;<sup>6</sup> but this decision, so far as it implies that such partition affects the legal *title*, has since been doubted in a case presenting the following circumstances: B and A, being tenants in common, made a parol partition, and each took possession of the part thereby allotted to him. A confirmed the partition by making a deed

<sup>1</sup> Ebert v. Wood, 1 Binn. 218.

<sup>2</sup> Calhoun v. Hays, 8 Watts & S. 182; McMahan v. McMahan, 13 Pa. St. 376; Rider v. Maul, 46 Pa. St. 378; Maul v. Rider, 51 Pa. St. 377; McConnell v. Carey, 48 Pa. St. 349.

<sup>3</sup> Slice v. Derrick, 2 Rich. 629.

<sup>4</sup> Haughbaugh v. Honald, 3 Brev. 98; Walker v. Bernard, 1 Cam. & Norw. N. C. 82.

<sup>5</sup> Coles v. Wooding, 2 Pat. & H. 197. "Tenants in common who have not perfected their title by fifteen years' possession, under the statute, may make partition by parol, provided this severance is accompanied by acts of possession in severalty." Pomeroy v. Taylor, Brayt. 174. Parol partition protected in Illinois. Manly v. Pet-  
tee, 38 Ill. 131; Tomlin v. Hilyard, 43 Ill. 300.

<sup>6</sup> Bompert v. Roderman, 24 Mo. 398.



to B; but B never made any conveyance to A. A's grantee brought his petition in equity, stating these facts, and praying that the partition might be confirmed by decreeing the legal title. The Court in which the petition was filed decided that it did not state facts sufficient to constitute a cause of action. The Supreme Court reversed the decree of dismissal, in its opinion by Adams, Judge, saying: "Although it is laid down that a parol partition is good as between the parties, yet it seems to me that the equitable title only passes, which by adverse possession may ripen into a legal estate. In my opinion, the plaintiff had a right to have this parol partition confirmed by a decree vesting in him whatever title the defendant had in the premises."<sup>1</sup> In Ohio, it is certain that if a parol partition be consummated by possession and be a fair division of the common property, it will not be disturbed in equity after the lapse of several years, although some of the parties were infants.<sup>2</sup> In Texas, a parol partition is considered as valid, because there is a material difference between the Statute of Frauds of that State and the English statute. "The difference in the two statutes is shown to be this: in our statute a contract for the *sale of lands* must be in writing; the English statute goes further, and embraces not only a sale of lands, but any *interest in or concerning them*."<sup>3</sup>

§ 399. **Parol Partition of Trust Estates.**—Where an estate is so far exempt from the operation of the Statute of Frauds that it may still be created by parol, it may also be divided among the co-owners in the same manner. In considering the effect of a parol partition made between several *cestuis que trust*, Chief Justice Parker of the Superior Court of New Hampshire expressed his views upon this subject in the following clear and convincing language: "This is a case where the property was held by a trust arising by implication of law, and in its original inception the trust is within the express exception of the statute. No instrument in writing is necessary in order to create the trust estate, or to show the

<sup>1</sup> *Hazen v. Barnett*, 50 Mo. 507.

<sup>2</sup> *Piatt v. Hubbel*, 5 Ohio, 245.

<sup>3</sup> *Stuart v. Baker*, 17 Tex. 420.



right of the *cestui que trust*. And if the existence of the trust estate may be shown by parol, because the case is not affected by the statute, and the trust may be enforced without writing because never within the statute, we see no good reason for holding that the estate is within the statute in other respects. So long as it exists as a trust, thus raised by implication of law, it exists with all the incidents attached to such an estate before the statute, because of the exception. And one of these incidents, as we have seen, is that partition may be made by parol. It would present a singular state of the law were we to hold that the creation and continued existence of the estate and title might be shown without any written declaration of the trust, but that a division of the property among those who thus held it must be proved by writing; thus requiring a higher degree of evidence to show the partition of the property than was required to show the existence of the title to it.”<sup>1</sup>

§ 400. **Parol Partition — Can it Transfer the Legal Title?**—“In no case, however, has a verbal partition been held sufficient for any other purpose than to ascertain the limits of the respective possessions; and in a case in New York, where the plaintiff in ejectment undertook to base his title upon a verbal partition, though there had been separate holdings for twenty-five years under it, the Court held that a verbal partition could in no case operate to pass title.”<sup>2</sup> We think the foregoing quotation, if not contradicted, is well calculated to lead to a misapprehension of the law upon this subject. In those decisions which affirm the validity of parol partitions, the whole tenor of the opinion of the Courts, with one or two exceptions, is to the effect that such partitions invest each cotenant with a full perfect legal title to the purparty allotted to him, and of which, by virtue of such allotment, he has taken and held possession. If he is so invested with the legal title, no impediment exists to prevent his maintaining ejectment against any person unlawfully in possession. The case in New York, referred to in the preceding quotation, is that of *Jackson v. Vosbrugh*, 9 Johns. 270. An inspection of the original report will show how

<sup>1</sup> *Dow v. Jewell*, 18 N. H. 354.

<sup>2</sup> *Browne on St. of Frauds*, sec. 70.

wonderfully the case has been misrepresented. In the first place, it was not the plaintiff but the defendant who undertook to avail himself of a parol partition. In the second place, the validity of the partition was denied solely on the ground that the parties *never were cotenants* of the property in dispute, the Court holding that when one person was owner in severalty, and he, with others, made a parol partition of his property, on the hypothesis that they were tenants in common, such parol partition did not transfer the title from the owner and vest it in one who never had any interest in it. The Court, therefore, instead of holding as represented, held that "where the whole right and title of the party setting up the tenancy in common is denied, and in fact abandoned, the parol partition will not operate to transfer title;"<sup>1</sup> and in what it actually held, the case has since been approved in another State,<sup>2</sup> and is certainly unquestionable as well as unquestioned law.

§ 401. The American text-writers have shown a decided preference for the rule sustained by the English authorities, viz., that a parol partition is no longer capable of destroying a cotenancy although fully executed by taking and holding possession under it. In fact, some American writers have attempted to ignore the American decisions dissenting from the English rule. Thus, Mr. Washburn, in his work on real property, declares, in general terms, that "no parol partition can be effectual unless accompanied by deeds from one cotenant to the other, inasmuch as the Statute of Frauds applies to such cases."<sup>3</sup> Mr. Browne, in his Treatise on the Statute of Frauds,<sup>4</sup> after showing some of the decisions on both sides of this question, announces, as his conclusion, that "the decided weight of authority in the United States seems to favor the English view of this question, and to be opposed to allowing a verbal partition to be effectual even to sever the possession of tenants in common." But it is scarcely possible to consider the decisions cited in preceding sections,<sup>5</sup> without realizing that the authorities are much more evenly divided than Mr. Browne supposes them to be; and

<sup>1</sup> 9 Johns. 276.

<sup>2</sup> *Bompart v. Roderman*, 24 Mo. 398.

<sup>3</sup> 1 Washb. on Real Property, 430.

<sup>4</sup> Sec. 71.

<sup>5</sup> See secs. 397, 398.

whether we seek to determine the question by numbering the opposing decisions, or by considering the character and respectability of the Courts whence they proceeded, we shall, in either case, be unable to form any decided opinion, and shall be convinced that if the weight of the American decisions is in consonance with those of the English Courts, the preponderance is so slight as to scarcely turn the scale. Where so radical a difference of opinion exists in regard to an important legal proposition, we naturally expect of the disputants a full statement of the reasons upon which their respective conclusions are based. But, in reference to the question we are now considering, it is equally a matter of surprise and of regret that the Judges on both sides have treated the matter as too clear for argument, and have found it more convenient to ignore than to refute.

§ 402. **Enforcing Parol Partition.**—But whatever effect may be conceded at law to parol partitions, we think it quite certain that, when executed by taking possession thereunder, they will be recognized and enforced in equity, particularly when such a partition and the possession based upon it have been mutually acquiesced in by the parties for a considerable period. “I do admit a parol agreement of long standing, acknowledged by all the parties to have been the actual agreement, and accordingly put in execution, will be established by this Court, where it appears that the persons who made such agreement had a right to contract, and I will not at fifty-three years’ distance; suffer either of the parties to controvert the equality of the partition at the time it was made.”<sup>1</sup> It is true that in most of the cases in which equity has protected rights based upon parol partitions, possession had been taken and continued under such partition for a long period of time, or one of the parties acting upon his faith in the partition has made valuable improvements upon the purparty allotted to him. But while either of these circumstances might justly be regarded as entitled to great consideration, we conceive that neither is essential to warrant the

<sup>1</sup> Ireland v. Rittle, 1 Atk. 542; Whaley v. Dawson, 2 Sch. & Lef. 367; Kennedy v. Kennedy, 43 Pa. St. 417; Massey v. McIlwain, 2 Hill Oh. 424; Pope v. Henry, 24 Vt. 560.

interposition of the Court, and that a court of equity will compel the specific performance of a parol partition, as of any other parol contract relating to lands, whenever it has been carried into execution by the parties.<sup>1</sup> “While the legal title might not, perhaps, be considered as passing by a parol partition, unless after a possession sufficiently long to justify the presumption of a deed, yet the parol partition followed by a several possession, would leave each cotenant seized of the legal title to one-half of his allotment and the equitable title to the other half, and by a bill in chancery he could compel from his cotenant a conveyance of the legal title according to the terms of the partition.”<sup>2</sup>

§ 403. **By Grantee of Interest to be Located.**—Where a specific quantity of land is conveyed to be located at the election of the grantee within the limits of a larger tract of which the lands granted are a part, the grantee, though tenant in common with his grantor until the selection is made, becomes, as soon as he locates his tract, owner thereof in severalty. “This location, in conformity with the provisions of the deed itself, renders that certain which was before uncertain,” and gives a good legal title to the part selected.<sup>3</sup>

§ 404. **Parol partitions, according to the Mexican and Spanish law, were valid.** But “in order to uphold a partition under the Spanish law, as well as under the common law, it must satisfactorily appear that there was not only an agreement to make the partition, but that the same was fully executed and followed by a several possession by either the parties themselves or their grantees.”<sup>4</sup>

§ 405. **Partition of Lands of Proprietaries.**—The proprietaries which existed at an early day in the New England States, and under which large tracts of land were acquired and held, in undivided interests, by grants from the State, seem to have exercised many of the powers now exercised only by corporate bodies, and, in the general management

<sup>1</sup> Goodhue v. Barnwell, Rice Eq. 236; Hazen v. Burnett, 50 Mo. 507.

<sup>2</sup> Tomlin v. Hilyard, 43 Ill. 302.

<sup>3</sup> Corbin v. Jackson, 14 Wend. 625; Jackson v. Livingston, 7 Ib. 136.

<sup>4</sup> Long v. Dollarhide, 24 Cal. 222; Elias v. Verdugo, 27 Cal. 425; Lynch v. Baxter, 4 Tex. 431.

and disposition of their lands, to have been exempt from most of the rules applicable to ordinary tenancies in common. In order to perfect a partition of their lands, it was not necessary that any deed or other written instrument should be made, nor that the partition should be consummated by a corresponding possession in severalty. At a meeting of the proprietors, the interest of any one of their number might, by a vote, be set off to him in severalty. His title to the tract allotted became thereby as perfect as though based upon a conveyance from all his co-proprietors.<sup>1</sup>

§ 406. **Partition by Mutual Conveyances.**—The most usual manner of accomplishing a voluntary partition of lands is by means of conveyances or releases between the cotenants. The forms of conveyance appropriate to the different species of cotenancy have been treated in a previous chapter. In this country, the most common mode of effecting partition by conveyances is for each cotenant to take a conveyance from all the others of the lands which have been previously agreed upon as his purparty. But in England, it is said that “by far the more usual and convenient mode of making partition, whether by coparcenary, joint-tenants, or tenants in common, is for all the cotenants to join in conveying the entirety of the estate to be divided to a trustee and his heirs, and on this seisin to limit the use of each particular allotment to the party for whom it was intended. By this arrangement, the parties may, if they wish it, have their allotments limited to a different set of uses from those to which their undivided shares stood subject. It is obvious, however, that this mode can only be resorted to where the lands are held by such a tenure as will admit of their being conveyed to uses by force of the statute: therefore, in the case of joint-tenants and tenants in common of a term of years, the analogous and equivalent mode of assignment and reassignment should be adopted.”<sup>2</sup> When the partition is effected by mutual deeds between the cotenants, all these deeds “must be taken and

<sup>1</sup> Colburn v. Ellenwood, 4 N. H. 99; Atkinson v. Bemis, 11 N. H. 47; Corbett v. Norcross, 35 N. H. 114; Adams v. Frothingham, 3 Mass. 352; Springfield v. Miller, 12 Mass. 415; Folger v. Mitchell, 3 Pick. 399.

<sup>2</sup> Allnatt on Part. 181-2.

construed together as one instrument, in the light of all the surrounding circumstances to which they obviously and directly point; for by such circumstances, not only the parties to the deeds, but all persons claiming under them, are bound, it being a general rule of law and of equity, that 'when a purchaser cannot make out a title but by a deed which leads him to another fact, he shall be presumed to have knowledge of that fact.'"<sup>1</sup> If mutual deeds of partition be made to the husbands of two tenants in common, the estates thereby acquired by the husbands are held in trust for the wives; and if the deeds appear, on their face, to be deeds of partition, no doubt a vendee of one of the husbands would, by force of the notice given by the deeds through which he must claim, be charged with notice of the wife's equity.<sup>2</sup>

§ 407. **Partition by Separate Conveyances to Strangers.**—According to a decision of the Supreme Court of Wisconsin, two cotenants may produce a partition of their lands by virtue of separate conveyances made by them to third persons: as if A, being one of the cotenants, convey the north half of the lands of the cotenancy to C, by a conveyance purporting to transfer an estate in severalty; and B, being the other cotenant, by a similar conveyance, afterwards convey the south half of the lands to D. "Where there are two tenants in common, each owning an undivided half of the lands, neither can make a partition which will be binding on the other, by assuming to convey either half specifically. But if one does so convey, we think the other would be at liberty to acquiesce, and to accept the remaining half. And if he should do so, by conveying that specifically, the two conveyances would operate as a complete and binding partition."<sup>3</sup> We doubt the correctness of this decision, unless it can be sustained upon the ground that a parol partition is valid, and that the two conveyances taken together constitute sufficient evidence of an agreement for partition between the cotenants. If the Statute of Frauds is applicable to a partition executed by taking possession in accordance with it, then

<sup>1</sup> *Norris v. Hill*, 1 Mich. 205.

<sup>2</sup> *Weeks v. Haas*, 3 Watts & S. 521.

<sup>3</sup> *Eaton v. Tallmadge*, 24 Wis. 223.

we cannot conceive how the interest of either of the cotenants can be transferred from him and vested in another, except by a conveyance to which he is grantor, and by which he assumes to invest some one with title as his grantee. In the case decided in Wisconsin, it seems to be conceded that the property remained in moieties until the conveyance from B to D. In order to accomplish the effect assigned to it by the Court, it was necessary for that deed to dispose of the interest of A, who was not a party as grantor, and to invest an interest in C, who was not named as a grantee. In addition to its operation for and against parties not named nor referred to therein, it was necessary for the provisions of this deed to be extended to property not embraced within any description to be found therein. In giving the deed so unusual an interpretation, the Court probably sought and attained substantial justice between the parties in interest, and in so doing, overlooked and ignored relevant and well defined rules of law. The same question has been examined and decided in Maine, in a case wherein it appeared that two cotenants made a parol partition, took and held possession thereunder many years, and each conveyed his purparty to a stranger to the cotenancy. The Court held that neither cotenant "could invest the other with a separate title to a portion of the tract, without the formality of a deed;" and that each could therefore avoid the conveyance of the other, and enforce a partition of the property.<sup>1</sup>

§ 408. **Presumption of Voluntary Partition.**—Whether we regard a voluntary partition as capable of being consummated by virtue of possession taken in pursuance of a parol agreement for the division of lands, or whether we regard such partition as inchoate until confirmed by conveyances duly executed in pursuance thereof, it may, upon either hypothesis, be occasionally established by parol evidence, which, though not directly proving the partition, may be of such a character as to produce the conviction that a partition has been made. Thus, if the cotenants had for a long period of time each occupied a distinct part of the lands of the co-

<sup>1</sup> *Duncan v. Sylvester*, 16 Me. 390.



tenancy, apparently exercising the rights of sole ownership, and being recognized by his companions in interest as entitled to possession in severalty, these facts might properly be submitted to a jury as evidence tending to prove an antecedent partition, and the jury would be justified in finding either way, according to the impression which the evidence happened to produce on their minds.<sup>1</sup> So, it has been held that if one cotenant owns two-thirds, and the other one-third, of three lots of land, the fact that the former conveyed two of these lots by conveyances purporting to transfer the same in severalty, might be submitted to the jury as evidence of a previous partition.<sup>2</sup>

§ 409. **Warranty**—none arising from Voluntary Partition.—We shall hereafter show, in treating of compulsory partition, that, by the common law, every coparcener, in case of her eviction by title paramount from her purparty, had the right to call upon the other cotenants to make up the amount lost by the paramount title, or to contribute *pro rata* according to the extent of the loss; or the cotenant so evicted might reënter upon the lands of the cotenancy, and thus avoid the previous partition. It is supposed that this right was accorded to coparceners because they were by law compellable to make partition. If the part allotted to either coparcener, and which she could not avoid accepting, were to be taken from her by a superior title, and she be without redress from her coparceners, it would follow that the writ of partition had operated to the extent of casting upon her the whole burden of the paramount claim.<sup>3</sup> When by statute the right to compel partition was extended to joint-tenants and to tenants in common, it was thought proper to accompany this right with means of redress in case of failure of title to any part of the lands allotted, as had before been accorded to parceners. But upon a voluntary partition, by whatever method effected, the reason usually assigned for allowing each cotenant to recover of the others on account of his evic-

<sup>1</sup> *Adie v. Cornwall*, 3 Monr. 288; *Walker v. Frazier*, 2 Rich. Eq. 111; *Livingston v. Ketcham*, 1 Barb. 592; *Gillespie v. Johnson*, Wright, 232; *Tomlin v. Hilyard*, 43 Ill. 302; *Vasey v. Board of Trustees*, 59 Ill. 191.

<sup>2</sup> *Slade v. Green*, Taylor, N. C. 111.

<sup>3</sup> *Rawle on Covenants for Title*, 474-5; *Co. Litt.* 365 b; *Litt. sec.* 262.



tion from the whole or any part of his allotment, does not exist. And where the reason does not exist, it has been very logically insisted that the rule ought not to be applied.<sup>1</sup> In one instance, two cotenants, Smith and Houston, effected their partition by mutual deeds of bargain, sale, and release, each purporting to be for a consideration in money. Subsequently, it was ascertained that the title of Houston was worthless. In the meantime, both Smith and Houston had conveyed their interests acquired by virtue of the partition. This partition having been declared void because one of the parties to it had no title, a question arose in regard to the relative claims and rights of the grantees of Houston and the grantees of Smith. The grantees of Houston insisted that the deeds referred to did not operate as a "simple extinguishment of interest, like a deed of partition or a mere release, but a positive, affirmative conveyance, by which Smith sold a part of his land to Houston, and Houston sold a part of his land to Smith; so that each purchaser from Houston may trace a part of his title to Smith, and each purchaser from Smith can trace a part of his title to Houston; and, consequently, the condition of each purchaser, deriving his title from the same source, is equally meritorious." But to this line of argument the Supreme Court replied as follows: "We cannot admit this to be the true nature of the transaction. The parties did not intend to acquire new rights, but to regulate the manner in which subsisting rights were to be enjoyed. Smith did not contemplate acquiring any title from Houston, nor to communicate any of his own, nor to share with Houston, nor with Houston's grantees, the benefit of warranties from his own grantors. But a simple partition, by release, was all the parties meant, as they specified in the recital, and no one is liable to be misled by the nominal money consideration, or by the use of the words 'bargain and sale' in this connection. The parties to these deeds lost nothing and acquired nothing, except defined boundaries to the land which they previously held in common. The purchasers from Houston, therefore, are not authorized to rely

<sup>1</sup> Rawle on Covenants, 476; *Morrice's Case*, Coke, 712 b; *Weiser v. Weiser*, 5 Watts, 280; *Picot v. Page*, 26 Mo. 422.

upon this act as anything except a partition—defining boundaries, but conferring no title. They derive from Houston alone, and must be content with rights subordinate to such equities as the purchasers from Smith may exact.”<sup>1</sup> In New York, a parol partition of the interests of several coheirs can only give to each the rights and interests, either vested or contingent, which the others then have in the lands set off in severalty. If one of the parties to such partition subsequently acquires an additional interest as heir to one of his children, such interest does not enure to the benefit of the other cotenants. The subsequently acquired interest is not affected by the previous partition, because it was not then a vested or contingent interest, but a mere chance of succeeding to the same as heir-at-law—a mere possibility, unaccompanied by any interest whatever in the premises.<sup>2</sup>

§ 410. **Warranty implied in some of the States.**—Some of the American cases ignore the distinction mentioned in the preceding section as existing between voluntary and compulsory partitions;<sup>3</sup> and at least concede to the former such an implied warranty as will estop each of the cotenants from denying the validity of the common title. In Kentucky, it has been said that by “a deed of partition where there is no express warranty, the parties are bound, in case of eviction of either from his share, to restore a part of the residue of the estate.”<sup>4</sup> In California, a deed of partition was executed by a large number of persons, in which they appointed commissioners to make a partition of lands according to terms contained in the deed. These commissioners were to make a report of their partition, and accompany it with a map showing the different parts allotted to each cotenant. Upon the filing of the map for record, the deed was to take effect. Subsequently, one of the parties to this deed resisted an action of ejectment brought against him to recover a tract which the commissioners had allotted to another of the cotenants. The plaintiff, at the trial, rested upon the deed of partition without offering any other evidence of title, con-

<sup>1</sup> Dawson v. Lawrence, 13 Ohio, 546.

<sup>2</sup> Carpenter v. Schermerhorn, 2 Barb. Ch. 322.

<sup>3</sup> Morris v. Harris, 9 Gill, 26.

<sup>4</sup> Rogers v. Turley, 4 Bibb, 356.

tending that the deed was a "confession of titles which the parties to it cannot contradict." The defendant offered to show that he was in possession previous to the deed, by way of proving superior title in himself; but his offer was rejected by the Court, on the ground that he was estopped by the deed. On appeal, the Supreme Court "apprehended that when parties go into a partition of property upon certain terms and conditions, each to receive a several portion of a common estate, the instrument of partition, founded upon mutual releases, itself is such affirmation of interest and title on the part of each, as to estop him to deny that he did have interest and ownership in the premises; and the release and conveyance of his interest to his parceners is evidence of title in his grantees which he cannot dispute. He takes, by virtue of the deed, all *their* interest, and cannot be allowed to say that he holds possession by title paramount to that which he conveyed."<sup>1</sup> In those States where a covenant of warranty is, in the absence of a stipulation to the contrary, implied from a voluntary partition, a covenant inserted in his deed by which the cotenant warrants against all persons claiming through or under him, or warrants against any specified claim or interest, is understood to displace the implied covenant of warranty, and to restrict the grantee's remedy to the express covenants contained in the deed.<sup>2</sup>

§ 411. **Effect on Wife's Right to Dower.**—When the interest which a married woman has in the lands of a cotenancy is not that of a cotenant, but only a right of dower arising from the fact that her husband is a cotenant, his power to affect her rights by a voluntary partition is greater than in the case where she has title as owner of one of the moieties. If her husband be a joint-tenant, he has not such a seisin that she can acquire any right to dower, unless the joint-tenancy should be in some manner converted into a tenancy in common. If the joint-tenants partition their property, the husband thereby acquires a sole seisin of the part allotted to him, and the wife's right to dower immediately attaches to such allotment; but she has no right to dower in any other part of

<sup>1</sup> *Tewksbury v. Provizzo*, 12 Cal. 25.

<sup>2</sup> *Morris v. Harris*, 9 Gill, 26; *Rogers v. Turley*, 4 Bibb, 356.

the lands of the joint-tenancy. But if the husband's interest be that of a parcener or tenant in common, the right of the wife to dower does not depend on the making of a partition of the premises—it exists antecedent to such partition.<sup>1</sup> But it is not paramount to the right of the cotenants of her husband to compel a partition, nor does it interfere with or in any respect impair his authority to make a valid partition by deed or agreement. As the husband is compellable by legal proceedings to make partition with his cotenants, it is universally conceded that he may do voluntarily that which the law will otherwise oblige him to do. Whenever, therefore, the husband perfects a voluntary partition, the dower interest of his wife is thereby removed from the purparties of the other cotenants, and confined to the purparty of the husband.<sup>2</sup> *Femes covert* seeking to assert dower rights “will be restricted, both at law and in equity, to the allotments of their husbands, and will be estopped from seeking to have dower assigned on undivided shares of other parcels. By confining them to the equal shares which their husbands take in the partition, they have all the dower the law gives them.”<sup>3</sup> A voluntary partition is allowed to operate upon inchoate rights of dower, because these rights are not thereby destroyed or impaired, but affected substantially in the same manner that the estates of the husbands are affected—an undivided interest in the whole property becomes a several interest in a specified parcel. Whenever the husband exercises his power of making voluntary partition, for the purpose of destroying the wife's rights, or of accomplishing a fraud upon her, he is not acting as the law would compel him to act, and the reason for holding the wife bound by his partition fails.<sup>4</sup> Hence, if he makes partition, taking the smaller and less valuable purparty, and receiving a compensation for so doing, the wife's right to have her dower assigned at his death will not be restricted to the lesser purparty.<sup>5</sup> It seems that the right of a

<sup>1</sup> See sec. 106.

<sup>2</sup> *Potter v. Wheeler*, 13 Mass. 506; *Lloyd v. Conover*, 1 Dutch. 51; *Wilkinson v. Parish*, 3 Paige, 658; *Jackson v. Edwards*, 22 Wend. 512; *Lee v. Lindell*, 22 Mo. 202.

<sup>3</sup> *Totten v. Stuyvesant*, 3 Ed. Ch. 503.

<sup>4</sup> *Potter v. Wheeler*, 13 Mass. 506.

<sup>5</sup> *Mosher v. Mosher*, 32 Me. 414.

husband by a voluntary partition to prescribe limits to the wife's inchoate right of dower does not vest in his grantee. Hence, where a husband, being a cotenant, conveyed his moiety by a deed in which the wife did not join, and the grantee with the other cotenants caused the tract to be segregated into lots, and thereafter partitioned it among themselves, it was held that the wife, on the decease of her husband, was entitled to have her dower assigned out of the *whole* tract, and that she could not be compelled to confine her claim to the lots which had been set off in severalty to her husband's grantee.<sup>1</sup>

§ 412. **Effect on Femes Covert.**—The property proposed to be made the subject of a voluntary partition may be owned in whole or in part by persons laboring under some disability, such as coverture, lunacy, or infancy. In either of these cases, it is important to determine whether the person or persons subject to some one of these disabilities may make a valid partition; and if so, by what means it is to be accomplished. A married woman may be interested in the lands of the cotenancy directly, as when she is one of the cotenants, or more remotely, as when her husband is a tenant in common or parcener, and she is, on that account, entitled upon his death to have her dower assigned out of his moiety. Where a wife was the cotenant whose interests were to be affected, it has never been possible to permanently prejudice her rights by a partition to which she did not give her assent. If the partition be sought to be consummated by mutual conveyances, or by a single conveyance, no doubt the interests of every cotenant then subject to the disabilities of coverture can only be bound by her executing the conveyance which purports to dispose of her moiety, and that such execution must be made in the mode prescribed by law for the conveyance of her real estate to third persons. But while a deed intended to transfer the moiety of a *feme covert* ought to be executed in the same manner and with the same formality as a conveyance of her separate estate, it must not be forgotten that, in many of the States, parol partitions are recognized

<sup>1</sup> Rank v. Hanna, 6 Ind. 20.

and protected, and that a deed of partition, though insufficient of itself to consummate a partition, may, taken with other evidence, establish such a parol partition as the Courts will not permit to be disturbed, unless it was clearly unequal when made. With respect to parol partitions between coparceners, the law, as thus laid down by Mr. Allnatt, is fully supported by the common law authorities: "If parceners, seized in fee simple, marry, and they and their husbands make an equal and fair partition in value, it will be binding on the wives and their heirs; and the reason of this is, because the husbands and wives are compellable at common law to make partition; and that which they are compellable to do in this case by law they may do by agreements without process of law. But it is expressly stated that the wife must be a party to the partition. So a parcener and her husband may grant a rent for equality of partition out of her part; and the partition being *equal*, it shall charge such part forever. But if the partition be *unequal*, though it shall be good during the lives of the husbands, yet the woman who has the lesser part may defeat the partition, by entry after her husband's death. In this case, the partition is not actually void, but voidable; for if, after the husband's decease, the wife enters into the unequal part, and agrees to it, this shall bind her. And it may be observed that when a partition is defeated for inequality, it shall not be defeated for the surplusage only, but *in toto*. And with respect to the necessity of equality of division, the partition by agreement differs from that by writ. If the annual value of the purparties is equal at the time of the partition, and afterwards becomes unequal by any matter subsequent, as by surrounding, ill husbandry, &c., yet the partition remains good."<sup>1</sup> Mr. Allnatt further remarks that "in all cases in which a partition is intended to be made by husbands and wives, of the wives' lands, though they are seized as parceners, it seems advisable to make them join in levying a fine, that all questions in regard to the fairness, &c., of the

<sup>1</sup> Allnatt on Partition, 21 to 23; McMahan v. McMahan, 13 Penn. St. 380; Litt. sec. 257, 256; Jones' Devises v. Carter, 4 Hen. & M. 190; Co. Litt. 171 a, 171 b, 169 b, 166 a; Vin. Ab. Partition (E); Wetherill v. Mecke, Brightley's Reports, 140.

division may be avoided. And, if joint tenants or tenants in common, their concurrence is indispensable."<sup>1</sup>

§ 413. **Between Husband and Wife.**—If a husband and wife be cotenants with each other, they cannot in a direct manner make a voluntary partition, though we apprehend they would have no difficulty in doing so by the aid of circumlocutory conveyances. In a case arising in the State of Missouri, all the persons interested in a large tract of land executed a deed of partition, in which they mutually released to one another certain tracts to be held in severalty according to previous agreement. Among these persons were Joseph Pratte and Marie his wife, both of whom were cotenants in the tract, and to whom, by this deed of partition, distinct lots of land were severally assigned. The Supreme Court of the State subsequently held that this partition did not terminate the cotenancy of the husband and wife in the lots so assigned them, because "they could not mutually release to each other their respective interests in the lots by a deed of partition, which was executed between them and the other parties in interest. According to the principles of our law, this could not be done. The legal unity of husband and wife prevents this."<sup>2</sup> We think that a husband and wife, desirous of partitioning lands of which they are cotenants, can do so by jointly conveying the lands to a third person, and procuring him to reconvey a distinct parcel to each to hold in severalty. On the other hand, in Viner's Abridgement, it is stated that "*partition between husband and wife of lands, if it be equal, shall bind the makers, because they are compellable to make partition; but secus of an use because they are not compellable.*"<sup>3</sup>

§ 414. **Infancy.**—According to Littleton: "If two coparceners be, and the youngest being within the age of twenty-one years, partition is made between them, so as the part which is allotted to the youngest is of lesse value than

<sup>1</sup> Allnatt on Partition, 27.

<sup>2</sup> Frissell v. Rozier, 19 Mo. 448.

<sup>3</sup> Vin. Ab. Tit. Partition, (D. sub 13,) citing Arg. 2 Le. 25; Pasch. 30 Eliz. B. R. in case of Ross v. Morris.



the part of the other, in this case the youngest, during the time of her nonage, and also when she cometh of full age, scil. of 21 yeares, may enter into the part allotted to her sister and defeat the partition. But let such parcener take heed when she comes of her full age, that she taketh not to her owne use all the profits of the lands or tenements which were allotted unto her; for then she agrees to such partition at such age, in which case the partition shall remain in force. But peradventure she may take the profits of the moitie, leaving the profits of the other moietie to her sister.”<sup>1</sup> Lord Coke comments upon this section as follows: “As before in the case of the fem covert, so it is in the case of the enfant; for if the partition be equall at the time of the allotment, it shall bind him forever, because he is compellable by law to make partition, and he shall not have his age in a *partitione faciendâ*; and though the partition be unequal, and the infant hath the lesser part, yet is not the partition void but voidable by his entry; for if he take the whole profits of the unequal part after his full age, the partition is good forever.”<sup>2</sup> In a case decided in New Brunswick, A, B, and C were tenants in common. In 1810, while A was a minor, her father, acting in her behalf, made partition with B and C. Four years later, but before attaining her majority, A married. Thereafter her husband occupied the portion allotted to her, until his death in 1842. In 1848, she sought to avoid the partition. Whereupon, it was determined that she had a reasonable time after the removal of her disability of coverture to object to the partition; but that six years was such an unreasonable delay as estopped her from making an objection which she might have made at once upon the decease of her husband.<sup>3</sup> “A *prochein ami* may make partition on behalf of an infant parcener, and it will bind the infant, if equal, for the *prochein ami* is appointed by law to take care of the inheritance of the infant; and this separation and division of his part from what belongs to another is so far

<sup>1</sup> Litt. sec. 258.

<sup>2</sup> Co. Litt. 171 a; Allnatt on Partition, 27; Vin. Ab. Tit. Partition (A, 4); Hemmich v. High, 2 Watts, 159; Calhoun v. Hays, 8 W. & S. 132; Bavington v. Clarke, 7 Penrose & W. 115; Darlington's Appropriation, 13 Penn. St. 490.

<sup>3</sup> Doe d. Estabrooks v. Harris, 2 Allen, N. B. 42.



from being a prejudice to the infant, that it is really for his benefit and advantage."<sup>1</sup>

§ 415. **Effect on Lien Holders.**—We have seen that voluntary partitions made by or on behalf infants, and *femes covert*, will be treated as binding and valid where they were equal at the time they were made, and were, in their inception and consummation, free from all taint of fraud. The theory upon which such partitions are enforced is that the interests of the cotenants are always best promoted by an occupation in severalty; and therefore that all honest and fair agreements, having a direct tendency to authorize such occupation, ought to be sustained. These parties, though under disability, may be compelled to make partition; and whatever the law will compel them to do, it ought to allow to be done without compulsion. It may happen that the moiety of one of the cotenants is subject to a judgment, mortgage, or other lien. In such case, what effect will the voluntary partition have on the lien-holder? The question has not received much consideration; but, so far as considered, the answer has been, that an equal and honest partition will bind him, and will convert his lien from a charge against an undivided moiety of the whole to a charge against the whole of the tract which has been taken in lieu of the moiety.<sup>2</sup>

§ 416. **Interests in Reversion or Remainder.**—A voluntary partition and the conveyance executed in pursuance thereof form no exception to the general rule, that by no means can a grantor convey a greater estate than he possesses. Hence, if a voluntary partition be made by a tenant in tail, it is not binding beyond his life; and the heir in tail may, upon the death of the tenant in tail, refuse to recognize the partition, and claim all the rights to which he would be entitled had no such partition been made.<sup>3</sup>

§ 417. **Powers Delegating Authority to make Partition.**—The power which every cotenant has of joining with

<sup>1</sup> Allnatt on Partition, 29; 2 Roll. Abr. 256; Vin. Abr. Tit. Partition (E.)

<sup>2</sup> Bavington v. Clarke, 2 Penrose & W. 124; Manly v. Pettee, 33 Ill. 128.

<sup>3</sup> Buxton v. Bowen, 2 W. & M. 365.

his companions in interest in making a partition of the common property, may, no doubt, be delegated by him to another; and when so delegated, it may be exercised by the agent as effectually as it could be exercised by the principal. A serious doubt once existed, and is not yet fully dispelled, as to whether a power to sell and exchange lands authorizes a partition; and it is said that lawyers of great eminence frequently expressed their satisfaction with partitions made without any other authority than that which was implied in such a power. In the first case in which the question seems to have been judicially considered, certain trustees were authorized "to make sale of, and to convey, surrender, and assure, or convey in exchange for or in lieu of other manors, lands, and hereditaments, &c., for the best price or valuable consideration in money or such other equivalent interest in manors, lands, and hereditaments, as to them the trustees shall deem proper." Under this power, the trustees joined in making a partition. The validity of this partition being subsequently questioned, it was upheld by Lord Chancellor Loughborough, in an opinion in which he said: "The question before me is the question whether, within the limits of this power, the partition is not an exchange. If the question was asked of me, whether a partition was not in view of the parties, I should be obliged to answer, that it was; for there is a supposition here that the interest vested by this settlement might be sold by parcels. Though there is some distinction between a partition and an exchange, their consequences and effects as to the interests of the parties are precisely the same. If any person had been ingenious enough to think of this objection at the time of the partition, by making the trustees sell, receive the money, and buy a third of the same estate, the whole would have been within the words of the power. They revoked the uses in order to acquire a divided third of the estate; which they have taken in lieu of an undivided part. They might have taken money, rent, land, anywhere else. It is in effect clearly, though not literally, within this power."<sup>1</sup> But this case, and the language we have just quoted, so far as they

<sup>1</sup> *Abel v. Heathcote*, 2 Ves. Jr. 98: S. C. 4 Bro. C. C. 278.

imply that the power to exchange includes the power of partition, did not remain long unquestioned. Lord Eldon in *M'Queen v. Farquhar*,<sup>1</sup> referring to *Abel v. Heathcote*, doubted whether the idea that "a power of exchange is well executed by a partition, is authorized by anything in that decision;" and he truly remarked that "exchange and partition are very different." His Lordship evidently considered that the conclusion reached in *Abel v. Heathcote*, could be justified only by treating the partition there upheld, as being authorized by the words in the power giving the trustees authority to convey for money, "or such other equivalent interest," etc. The case of *Abel v. Heathcote* was further questioned in *Attorney General v. Hamilton*,<sup>2</sup> by Sir Thomas Plumer, Vice Chancellor; and it is evident that it would now be very unsafe to act upon the theory that a power to exchange authorizes a partition.<sup>3</sup> If a power authorizes a sale only, we think there is less reason for holding that it will support a partition than when it authorizes an exchange. The Supreme Court of California has decided that a power of attorney to sell and convey any portion or all of the principal's real estate, and generally to do, transact, determine, and accomplish all matters, etc., although the matters should require more special authority than were comprised in the power, does not authorize the attorney to make partition of lands in which his constituent is a tenant in common.<sup>4</sup>

§ 418. **Agreement for Partition.**—An agreement in writing, entered into by several cotenants, whereby they mutually agree to divide their lands in a specific manner, but which does not contain words purporting to convey, transfer, or release to the respective cotenants the parts agreed to be allotted to them, is probably not good at law as a transfer of the legal title; but in equity it will be treated as an actual partition.<sup>5</sup> Notwithstanding the Statute of Frauds, it has always been conceded that "an *agreement in writing* to make

<sup>1</sup> 11 Ves. 475.

<sup>2</sup> 1 Madd. Ch. 122.

<sup>3</sup> Sugden on Powers, 480-482; Allnatt on Partition, 38 to 46.

<sup>4</sup> *Borel v. Rollins*, 30 Cal. 413.

<sup>5</sup> *Masterson v. Finnigan*, 2 R. I. 318.

partition will have the *same effect, in equity*, as an actual partition at law."<sup>1</sup>

§ 419. **Deed or Agreement void as to one is void as to all.**—If an agreement or deed intended to be entered into by several cotenants, whereby they mutually convey to one another distinct parts of the common property to hold in severalty, or whereby they agree to a sale of the property and a division of the proceeds, or to an allotment and partition of the property to be made by certain referees, and it happens that after several have executed the instrument, others fail to do so, or that though all executed it, some of them were *femes covert* and did not execute in a manner which will bind them, in either event, as it was clearly the intent of the parties that all of them should be bound, and as the consideration of the instrument is mutual conveyances from and between all the parties, the instrument being inoperative as to part is inoperative as to all.<sup>2</sup>

<sup>1</sup> 2 Cruise, 410; Co.Litt. 169 a.

<sup>2</sup> Douglas v. Harrison, 2 Sneed, 382; Morris v. Richardson, 11 Humph. 339; Tewksbury v. O'Connell, 21 Cal. 69.

## CHAPTER XIX.

### OF THE COURTS HAVING JURISDICTION TO COMPEL PARTITION, AND THE SOURCE AND NATURE OF THEIR AUTHORITY.

Partition at Common Law confined to Estates in Parcenary, § 420.

English Statutes extending the Right of Partition, § 421.

General Outline of a Partition at Law, § 422.

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Advantages of Proceeding in Chancery, § 425.

Partition of Personal Property, § 426.

Difference between a Judgment and a Decree of Partition, § 427.

Jurisdiction over Partition in the United States, § 428.

Proceedings in Court exercising Common Law, Equity, and Statutory Jurisdiction, § 429.

§ 420. **Partition at Common Law.**—It would be difficult to discover any contingency arising from any part of the law of ownership in which the situation of the parties in interest could be more unfortunate than that of cotenants at the common law, when they could no longer agree in regard to the use and management of their common property, or when one of them was so evil disposed as to take advantage of all the opportunities which the law of cotenancy afforded him for distressing his companions in interest, and of injuring the common property, and depriving them of all beneficial ownership therein. When the creation of the cotenancy was not the result of agreement, purchase, or the act of the parties, it was clear that they were in no way blamable for its existence, and the law early provided means by which either might terminate its existence, and obtain an estate in severalty in lieu of an undivided interest. Mr. Reeves, in his summary of the law of England, as it existed towards the end of the reign of Henry III. (A.D. 1272,) states that “when an inheritance descended to more than one heir, and they could

come to no agreement among themselves concerning the division of it, a proceeding might be instituted to compel a *partition*. A writ was for this purpose directed to four or five persons, who were appointed justices for the occasion, and were to *extend* and appreciate the land by the oaths of good and lawful persons chosen by the parties, who were called *extensores*; and this extent was to be returned under their seals, before the king or his justices: when partition was made in the king's court, in pursuance of such extent, there issued a *seisinam habere facias*, for each of the *parceners* to have possession."<sup>1</sup> As the same author spoke of this reign as the period in which, after having travelled "through the profound darkness of the Saxon times, and the obscure mist in which the Norman constitutions are involved, we approach the confines of known and established law," it is probable that the proceedings for partition of which he wrote, though not mentioned before the reign of Henry III., were in existence at an earlier period, but are concealed from view by the "darkness" and the "obscure mist" of the more remote times. The writ of partition, as it existed at common law, could issue only at the instance of a coparcener, but the person against whom it issued might be either a coparcener, or one who had succeeded to the interest of a coparcener. The circumstances under which a coparcener was, and those under which she was not, entitled to this writ were thus stated by Mr. Roscoe in his *Treatise on the Law of Actions relating to real property*:<sup>2</sup> "A writ of partition lies at common law for one or more parceners against the other or others; and if one parcener, after issue had, dies, whereby her husband is tenant by curtesy, a writ of partition will lie against the husband."<sup>3</sup> So, if one parcener aliens in fee, the other may, at common law, have the writ against the alienee; and if there are three coparceners, and the eldest marries, and the husband purchases the interest of the youngest, though the husband be in respect of his own part a stranger, yet he and his wife may have a writ of partition at common law against the middle sister, for he is seized of one part in the right of

<sup>1</sup> Reeves Hist. 2d ed. (Dublin) 312; Finlason's ed. 335, citing Bracton, 71 b to 77 b.

<sup>2</sup> P. 130.

<sup>3</sup> Litt. sec. 264.

his wife.<sup>1</sup> If one parcener makes a lease for life, no writ of partition lies at common law, for she and her coparcener do not then hold the freehold insimul *et pro indiviso* according to the words of the writ, though if the lease be for years only, the writ lies for the freehold, then continues in parcenary.<sup>2</sup> So, if one coparcener disseises another, no writ of partition can be had during the disseisin;<sup>3</sup> and neither tenant by the curtesy, nor the alienee of a parcener, was entitled to this writ at common law."

§ 421. **English Statutes in regard to Partition.**—Joint-tenants and tenants in common became such by their own voluntary act. Their estates were always created by purchase; and whatever hardship or inconvenience might subsequently arise out of the co-ownership, it was always considered as the result of a relation voluntarily chosen by the parties, and from which the law would therefore grant them no relief. If any cotenant became dissatisfied with the cotenancy, and unwilling to continue his relations with the other cotenants, his only remedy consisted of purchasing their moiety, or of selling his own, or of making a voluntary partition with the other part owners. He could under no circumstances, except by the custom of some cities or boroughs, compel a partition.<sup>4</sup> The inconvenience resulting to tenants in common and to joint-tenants from their inability to compel partitions was, in many instances, of the most grievous character. At length, by stat. 31 Henry VIII., cap. 1, tenants in common and joint-tenants of estates of inheritance held in their own rights, or in that of their wives, were compelled to make partition in "like manner as parceners by the common law of the realm were compelled to do." The preamble of this statute was more lengthy than the remedial part, and described in strong language the wrongs which it was intended to avert.<sup>4</sup> As this statute applied only to joint-

<sup>1</sup> Co. Litt. 175 a; Allnatt on Partition, 54; Bac. Ab. Joint-Tenants (I.)

<sup>2</sup> Co. Litt. 167 a.

<sup>3</sup> Roscoe on Real Actions, 131; Allnatt on Partition, 55; Bac. Ab. Tit. Joint-Tenants (I); Miller v. Warmington, 1 Jac. & Walk. 493; Baring v. Nash, 1 Ves. & B. 555.

<sup>4</sup> The following is the statute, 31 Henry VIII., referred to in the text: "Forasmuch as by the common laws of this realm divers of the King's subjects, being seised of manors, lands, tenements, and hereditaments, as joint-tenants, or as tenants in com-

tenants and tenants in common of estates of inheritance, it remained for the legislative power of the realm to provide means to ameliorate the condition of cotenants of estates not of inheritance. This was soon afterwards done by the stat. 32 Henry VIII., cap. 32. This statute recited the passage of the previous act, the fact that such act made no provision for "joint-tenants and tenants in common, for a term of life or years, neither for joint-tenants and tenants in common where one or some of them have but a particular estate for term of life or years, and the other have estate or estates of inheritance;" and followed such recitals by an enactment "that all joint-tenants and tenants in common, and every of them,

mon, with other of any estate of inheritance, in their own rights, or in the rights of their wives, by purchase, descent, or otherwise, and every one of them so being joint-tenants, or tenants in common, have like right, title, interest, and possession in the same manors, lands, tenements, and hereditaments for their parts or portions jointly, or in common undividedly together with other; and none of them by the law doth, or may know their several parts or portions in the same, or that that is his or theirs, by itself undivided, and cannot by the laws of this realm otherwise occupy or take the profits of the same, or make any severance, division, or partition thereof, without other of their mutual assents and consents: by reason whereof divers and many of them, being so jointly and undividedly seised of the said manors, lands, tenements, and hereditaments, oftentimes of their perverse, covetous and malicious minds and wills, against all right, justice, equity, and good conscience, by strength and power, not only cut and fallen down all the woods and trees growing upon the same, but also have extirped, subverted, pulled down and destroyed all the houses, edifices, and buildings, meadows, pastures, commons, and the whole commodities of the same, and have taken and converted them to their own uses and bahoots, to the open wrong and disherison, and against the minds and wills of other, holding the same manors, lands, tenements, and hereditaments jointly, or in common with them, and they have been always without assured remedy for the same.

"II. Be it therefore enacted by the King, our most dread sovereign Lord, and by the assent of the Lords Spiritual and Temporal, and by the Commons in this present Parliament assembled, that all joint-tenants, and tenants in common, that now be, or hereafter shall be of any estate or estates of inheritance in their own rights, or in the right of their wives, of any manors, lands, tenements or hereditaments within this realm of *England, Wales*, or the marches of the same, shall and may be coerced and compelled, by virtue of this present act, to make partition between them of all such manors, lands, tenements and hereditaments as they now hold or hereafter shall hold as joint-tenants, or tenants in common, by writ *De participatione facienda* in that case to be devised in the King our sovereign Lord's Court of Chancery, in like manner and form as coparceners by the common laws of this realm have been and are compelled to do, and the same writ to be pursued at the common law.

"III. Provided always, and be it enacted, that every of the said joint-tenants, or tenants in common, and their heirs, after such partition made, shall and may have aid of the other, or of their heirs, to the intent to deraign the warranty paramount, and to recover for the rate as is used between coparceners after partition made by the order of the common law; anything in this act contained to the contrary notwithstanding."



which now hold or hereafter shall hold jointly, or in common, for term of life, year or years, or joint-tenants, or tenants in common, where one or some of them have, or shall have, estate or estates for term of life or years, with the other that have or shall have estate or estates of inheritance or freehold in any manors, lands, tenements or hereditaments, shall and may be compellable from henceforth by writ of partition to be pursued out of the King's Court of Chancery, upon his or their case or cases, to make severance and partition of all such manors, lands, tenements, and hereditaments which they hold jointly, or in common, for term of life or lives, year or years, or where one or some of them hold jointly, or in common, for term of life or years, with other, or that have estates of inheritance or freehold." By comparison of the date of these statutes with that at which, as stated by Mr. Reeves, the right of coparceners to compel partition was clearly recognized, it will be seen that nearly three centuries intervened after the writ of partition was granted to parceners before any relief whatever was provided for other cotenants. While the right to compel a partition was, by these statutes, so extended that after their passage it might be enforced between all cotenants, except tenants by entireties, it seems that the remedies provided by law for the enforcement of the right were tedious, expensive, and sometimes ineffectual. They were not, however, improved in any haste. It was a century and a half later before Parliament put forth another of its formidable preambles on this subject. This preamble declared that "the proceedings upon writs of partition between coparceners by the common law or custom, joint-tenants, and tenants in common, are found by experience to be tedious, chargeable, and oftentimes ineffectual, by reason of the difficulty of discovering the persons and estates of the tenants of manors, messuages, lands, tenements, and hereditaments to be divided, and the defective or dilatory executing and returning of the process of summons, attachment, and distress, and other impediments, in making and establishing partition, by reason of which divers persons having undivided parts or purparts are greatly oppressed and prejudiced, and the premises are frequently wasted and destroyed, or lie uncultivated and unmanured, so that the profits of the same are totally or

in a great measure lost.”<sup>1</sup> The enactment prefaced by this preamble directed that “after process of *pone* or attachment returned upon a writ of partition, affidavit being made by any credible person of due notice given of the said writ of partition to the tenant or tenants to the action, and a copy thereof left with the occupant, or tenant or tenants, or if they cannot be found, to the wife, son, or daughter, (being of the age of one and twenty years or upwards,) of the tenant or tenants in actual possession, by virtue of any estate of freehold, or for term of years, or uncertain interest, or at will, of the manors, lands, tenements, or hereditaments, whereof the partition is demanded, (unless the said tenant in actual possession be demanded in the action,) at least forty days before the return of said *pone* or attachment, if the tenant or tenants to such writ, or any of them, or the true tenant to the messuages, lands, tenements, and hereditaments, as aforesaid, shall not in such case, within fifteen days after return of such writ of *pone* or attachment, cause an appearance to be entered in such Court where such writ of *pone* or attachment shall be returnable, then, in default of such appearance, the demandant having entered his declaration, the Court may proceed to examine the demandant’s title, and quantity of his part and purpart, and accordingly as they shall find his right, part and purpart to be, they shall for so much give judgment by default, and award a writ to make partition.” The act also provided for the execution of the writ after eight days’ notice to the “occupier or tenant or tenants of the premises,” for the return of the writ after its execution, for a final judgment in pursuance of the return, and that such judgment should “conclude all persons whatsoever, whatever right or title they have or may at any time claim to have in any of the manors, messuages, lands, tenements, and hereditaments mentioned in said judgment and writ of partition, although all persons concerned are not named in any of the proceedings, nor the title of the tenants truly set forth.” By the second section of the act, all persons against whom judgment by default was given were allowed one year after the first judgment was entered, and infants, *femes covert*, lunatics, and

<sup>1</sup> Stats 8 and 9 Wm. III. cap. 31.

persons absent from the kingdom, were granted one year after his, her, or their return, or after the termination of the infancy, coverture, or lunacy, in which to apply to the Court to set aside the judgment, and for leave to appear and plead as if no such judgment had been given. The third section enacted "that no plea in abatement shall be admitted or received in any suit for partition, nor shall the same be abated by reason of the death of any tenant." The fourth and fifth sections were in reference to the manner of executing the writ, and the effect of the partition on the interests of lessors and lessees. The statute, though originally to continue in force for seven years, and "thence to the end of the next session of Parliament, and no longer," was made perpetual by statute 3 and 4 Anne, c. 18, § 2. While the legislative authority of England so long delayed the creation of remedies adequate to a speedy and effectual partition of the lands of cotenancies, cotenants did not remain without more satisfactory means of relief than those provided by law. Without legislative sanction, Chancery, as early as the reign of Elizabeth, began to exercise jurisdiction in suits for partition. This new jurisdiction was felt to be so much better adapted to the adjustment of the rights of cotenants that it rapidly grew into favor. The writ of partition, as known to the common law, fell into general disrepute and neglect, from which it could not be rescued by the statutes 8 and 9 Wm. III., already referred to in this section, and entitled "An act for the easier obtaining partitions of lands in coparcenary, joint-tenancy, and tenancy in common." The writ, as it was still much less commendable than proceedings in Chancery, went into desuetude, and was finally wholly abolished by the statute 3 and 4 Wm. IV., chap. 27, sec. 36.

§ 422. **General Description of Proceedings in a Partition at Law.**—When a cotenant wished to bring about a compulsory partition of the common lands, through the instrumentality of proceedings at law, his first step was to sue out a writ of partition, whereby the sheriff of the county was commanded to summon the other cotenants named in the writ and have them before the justices at Westminster on some general return day, specified in the writ, to show wherefore

they denied partition to be made of certain lands, etc. The process in partition was "summons, attachment, and distress infinite."<sup>1</sup> But the statute of 8 and 9 Wm. III., already referred to, governed the service of process after its enactment, and prescribed the course to be pursued when the persons summoned, or any of them, failed to enter their appearance within the time allotted to them for so doing. If, however, the defendants, instead of suffering their defaults to be entered, appeared in the action, the next step in the proceedings consisted of the filing of the plaintiff's declaration. To this declaration the defendant might plead the general issue, namely, *non tenent insimul*; but he could not, after the statute of 8 and 9 Wm. III., interpose any plea in abatement. If the action was confessed, or if after trial the issue was found for the plaintiff, there was entered in his favor an interlocutory judgment, *quod partitio fiat inter partes prædictas de tene-mentis, cum pertinentus*. This judgment designated the persons between whom partition should be made, and also the moieties to which each was entitled. Upon this judgment, a judicial writ issued to the sheriff. This writ recited the writ of partition and the judgment entered thereon, and commanded "the sheriff, together with twelve men of the vicinage, to go in person to the lands to be divided, and there, in presence of the parties, (if they appear, on summons to be made,) by the oaths of those twelve men, to make an equal and fair partition, and allot to each party his full and just share, and then return the inquisition of the partition, annexed to the writ, under the seals of the sheriff and the jurors, whose names are likewise to be returned."<sup>2</sup> After the writ was executed, by making the allotments as therein directed, it was returned by the sheriff, with the inquisition thereto annexed, showing in what manner the partition had been made. Then, upon motion to the Court, the second and final judgment was given, *quod partitio prædicta firma et stabilis in perpetuum teneatur*.<sup>3</sup>

<sup>1</sup> Allnatt on Partition, 65.

<sup>2</sup> Allnatt on Partition, 70; Booth on Real Actions, 244-5; 2 Cruise, 385; Petersdorff's Ab. Tit. Partition; Littleton, secs. 247, 248. For all the proceedings in partition, see Chitty Pl. 1390 to 1407; Bac. Ab. Joint-Tenants (I.)

§ 423. **Origin and Rise of Chancery Jurisdiction.**—That the writ of partition fell into general neglect and was finally abolished was due to the superior facilities afforded by a new means of compelling partition, namely, that which was carried on in Chancery. When or how Courts of Chancery first obtained jurisdiction in cases of partition has never been satisfactorily ascertained; but, like many other questions not susceptible of any positive and certain determination, it has occasioned considerable discussion, and no little warmth both of feeling and of expression. Mr. Hargrave, in one of his notes to Coke on Littleton, has said: “A new compulsory mode of partition has sprung up, namely, by decree of Chancery exercising its *equitable* jurisdiction on a bill filed praying for a partition: in which case it is usual for the Court to issue a commission for the purpose to various persons, who proceed without a jury. How far this branch of equitable jurisdiction, so trenching upon the writ of partition, and wresting from a court of common law its ancient exclusive jurisdiction over this subject might be traced by examining the records of Chancery, I know not. But the earliest instance of a bill for partition I observe to be noticed in the printed books is a case of the 40 Eliz. in Tothill’s *Transac. of Chanc.*, title *Partition*. According to the short report of this case, the Court interposed from necessity in respect to the minority of one of the parties, the book expressing that on that account he could not be made party to a writ of partition; which reason seems very inaccurate; for, if Lord Coke is right, that writ does lie against an infant, and he shall not have his age in it, and after judgment he is bound by partition. But probably in Lord Coke’s time this was a rare and rather unsettled mode of compelling partition; for I observe in a case in Chancery of the 6 Cha. I., which was referred to the judges on a point of law between two coparceners, that the judges certified for issuing a *writ of partition* between them, and that the Court ordered one accordingly;<sup>1</sup> which, I presume, would scarce have been done if the decree for partition and a commission to make it had been a current and familiar proceeding in Chancery.”<sup>2</sup>

<sup>1</sup> The case referred to was *Drury v. Drury*, 1 Ch. Rep. 26, 3d ed.

<sup>2</sup> Note to Co. Litt. 169 a.

In commenting upon this note, Mr. Fonblanque, in his *Treatise on Equity*, said: "Mr. Hargrave's opinion upon legal subjects is so deservedly entitled to influence the opinion of others, that I cannot refrain from observing that a practice sanctioned by a precedent of so early a date as the 40th Eliz. cannot reasonably be described as a *new mode*, particularly when it is considered there are few, if any, reports of decisions in equity of an earlier date. The reason assigned by Tothill for the decision is, in the opinion of Lord Coke, insufficient to support it; and it will become still more so when it is considered that an infant, when he attains his age, may shew cause against a decree of partition in equity, unless he be plaintiff in the suit. (Lord Brook *v.* Lord and Lady Hereford, 2 P. Wms. 518; Tuckfield *v.* Buller, Ambler, 197; 3 Atk. 627.) But though the reason assigned by Tothill fail, the decision is not destitute of principle to support it. \* \* \* The case of Drury *v.* Drury appears to have been decided in the sixth of Charles the First: previous to which period, and even to the 40th Eliz., equity had decreed an equal partition, when that made by the parties appeared to be unequal. (Norse *v.* Ludlow, 32 Eliz. Toth. 155.) Whether this partition was made by writ, commission, or consent, does not indeed appear; neither does it appear in Drury *v.* Drury upon what ground the writ or partition was decreed; but it is observable, in that case, that the question of partition was not referred to the judges, and that if it was, that they could not strictly, in such a case, have certified that a commission, which is an equitable process, ought to issue. The inference, therefore, drawn by Mr. Hargrave from this case cannot be supported, unless it can be at least shewn that the judges were called upon to decide not only the question of partition, but also to point out the mode to effect it. If, however, the authority of this case can in any degree support the doubt raised upon it, I think it must be removed by an almost immediately subsequent case, 14 Car. 1, Babb *v.* Dudeney, Tothill's Transaction, tit. Partition, f. 155, in which case the Court refused to interfere, not upon the ground that it had no jurisdiction, but because 'the matter was but £9 per annum.' Norbury *v.* Yarbury: Toth. Ubi supra. See also Manaton *v.* Squire, 2 Freeman, 26; in which case parti-

tion was considered as cognizable in equity as at law, and *Parker v. Gerrard*, Ambl. 236, in which case it is described as a matter of right."<sup>1</sup> Judge Story, in his Commentaries on Equity Jurisprudence,<sup>2</sup> refers to Mr. Hargrave's note in terms whose spirit is very identical with that manifested in the remarks which we have just copied from the Treatise of Mr. Fonblanque. But it is evident, from a passage in Judge Story's Commentaries, that he assigned to proceedings for partition in Chancery a date long anterior to that claimed by Mr. Fonblanque, and a scope so extensive as to embrace joint-tenants and tenants in common, at a period when all the common law authorities declare that none but coparceners were able to make a compulsory partition. The following is the passage referred to: "These remarks of the learned author [Mr. Hargrave's note] are open to much criticism, if it were the object of these Commentaries to indulge in such a course of discussion. It cannot, however, escape notice that, when the learned author speaks of this branch of equitable jurisdiction as trenching upon the writ of partition, and wresting from the courts of common law their ancient *exclusive* jurisdiction over the subject, he assumes the very matter in controversy. That the writ of partition is a very ancient course of proceeding at the common law is not doubted. But it by no means follows that the courts of common law had an exclusive jurisdiction over the subject of partition. The contrary may fairly be deemed to have been the case, from the notorious inadequacy of that writ to attain, in many cases, the purposes of justice. Thus, for instance, we know that until the reign of Henry VIII., no writ of partition lay, except in case of parceners. And to show how narrowly the whole remedial justice of this writ was construed, it was the known settled doctrine that if two coparceners be, and one should alien, in fee, the remaining parcener might bring a writ of partition against the alienee; but the alienee could not have such writ *against* the parcener. And the like diversity existed in cases of a writ of partition by or against a tenant by the courtesy. Now such a case would, upon the very face of it, constitute a clear case for the interposition of

<sup>1</sup> Fonblanque's Eq., book i., ch. 1, § 3, note f.

<sup>2</sup> Sec. 646.



a Court of Chancery, upon the ground of the total defect of any remedy at law, and yet of an unquestionable equitable right to a partition. Cases of joint-tenancy and tenancy in common afford equally striking illustrations. Until the statute of 31st Henry VIII., ch. 1, and 32d Henry VIII., ch. 32., no writ of partition lay at law for a joint-tenant or tenant in common. And yet the grossest injustice might have arisen, if a Court of Chancery could not, in such a case, have interposed and granted relief, upon the analogy to the legal remedy. The reason given at the common law against partition in such cases was more specious than solid. It was, that a joint-tenancy being an estate originally created by the act or agreement of the parties, the law would not permit any one or more of the tenants to destroy the united possession without a similar universal covenant. The good sense of the doctrine would rather seem to be, that the joint-tenancy being created by the act or agreement of the parties, in a case capable of a severance of interest, the joint interest should continue (exactly as in cases of partnership) so long as, and no longer than, both parties should consent to its continuance."<sup>1</sup> From the foregoing quotation, we conclude that Judge Story was loth to believe that joint-tenants and tenants in common were without any means of compelling partition, until such means were provided by statute of Henry VIII.; and that, in his judgment, as there was no remedy known to exist at law, there *must* have been some means of redress in Chancery. Perhaps Mr. Chitty's views on this subject coincided with Judge Story's. At all events, he declared that "bills for partition and apportionment were between joint-tenants and tenants in common, always sustainable and decreed in equity."<sup>2</sup> But it is not safe to assume that some remedy always existed for every wrong and inconvenience. That joint-tenants and tenants in common must at a very early day have felt the necessity of relief in equity by no means establishes that such relief was at once granted to them. In fact, we think the testimony borne by the statute of 31 Hen. VIII. is conclusive that Chancery had never at that time interposed in behalf of any cotenant by proceed-

<sup>1</sup> Story's Eq. Jur. sec. 647.<sup>2</sup> 2 Chitty Genl. Pr. 42.



ings in partition, because the preamble of that statute, after reciting the numerous and grievous wrongs inflicted upon joint-tenants and tenants in common, asserts that "they have been always without assured remedy for the same."<sup>1</sup> Different reasons have been assigned for the purpose of justifying the jurisdiction taken by Chancery in matters of partition. In the course of the argument in one case, it was insisted that this jurisdiction was based on the statute making co-tenants accountable to one another, whereby they became, as it was claimed, trustees for one another.<sup>2</sup> In another case, it was claimed to be a consequence of the statutes of 31 Henry VIII. and 32 Henry VIII.<sup>3</sup> Lord Eldon thought that the Court of Chancery issued commissions to make partition, not by virtue of any act of Parliament, but by analogy to its jurisdiction in case of dower.<sup>4</sup> All that can be known of the sources of Chancery jurisdiction of this subject, and of the reason for its assumption, is thus tersely, and we think correctly, expressed by Bacon in his Abridgment: "The Court of Chancery, at first acting only in the aid of the common law court, then assuming a concurrent, has at length obtained an almost exclusive jurisdiction over the subject. That it has no original jurisdiction, nor any express authority from statute, has been acknowledged by those who were most conversant with its jurisdiction and have best administered it: the general reception it has met with is owing to the advantage it has over the common law court, in being loose and free from all technical restraints; and to the powers it possesses of dealing with and providing for the various interests it may meet with."<sup>5</sup>

§ 424. **Right to Partition in Chancery, whether Absolute.**—From language employed by Lord Hardwicke, in the case of *Cartwright v. Pultney*,<sup>6</sup> it might be inferred that the remedy by partition in equity based on the legal title is

<sup>1</sup> See statute in note to sec. 421.

<sup>2</sup> *Earl of Kildare v. Eustace*, 1 Vern. 421.

<sup>3</sup> *Mundy v. Mundy*, 2 Ves. Jr. 125.

<sup>4</sup> *Agar v. Fairfax*, 17 Ves. 552. See also, to same effect, the argument for plaintiff in the case of *Watson v. The Duke of Northumberland*, 11 Ves. 155.

<sup>5</sup> *Bac. Ab. Joint-Tenants* (I.)

<sup>6</sup> 2 Atk. 380.

discretionary with the Court, instead of being a matter of right. But we think, on a fair construction of the language used by his Lordship, it must be conceded to amount to this, and no more, namely, that where it appears to the Court that the plaintiff's title is questionable, equity will not interpose in his behalf, but will leave him to his legal remedy. If his Lordship intended to assert that in the absence of suspicious circumstances tending to involve the plaintiff's title in doubt, a court of equity might, at its discretion, refuse to act, he is clearly overruled by the more recent decisions. It is now certain that unless when the titles of the respective parties are spread before a court of equity, it can see that there are legal objections to the complainant's title, he can demand, *as a matter of right*, that it proceed with the partition.<sup>1</sup>

§ 425. **Advantages of Proceedings in Chancery.**—Mr. Fonblanque, after employing all the means in his power to trace the history of Chancery jurisdiction in partition cases, added, by way of consolation for the unavoidably unsatisfactory nature of the information he had been able to obtain, that: "To establish the origin of any branch of legal or of equitable jurisdiction is always difficult and seldom necessary, provided the exercise of such jurisdiction is found to be conducive to the ends of substantial justice; and such will appear to be the tendency of the jurisdiction exercised by our courts of equity, in cases of partition, upon a reference to the difficulties which obstructed the mode of proceeding at common law."<sup>2</sup> The chief advantages of proceedings in Chancery over the proceedings by writ of partition at common law, are these: Courts of equity deal with complicated titles with greater ease and efficiency than courts of law;<sup>3</sup> courts of equity compel the execution of conveyances to each cotenant, from the others, for the lands embraced in his allotment, and thus provide him with a permanent and satisfactory muniment of title;<sup>4</sup> they may decree a pecuniary

<sup>1</sup> *Lucas v. King*, 2 Stock. Ch. 280; *Smith v. Smith*, 10 Pai. Ch. 478; *Wiseley v. Findley*, 3 Rand, 363; *Baring v. Nash*, 1 Ves. & B. 555; *Straughan v. Wright*, 4 Rand, 493; *Parker v. Gerard*, Amb. 236; *Vint v. Heirs of King*, 2 Am. Law Reg. (O. S.) 729.

<sup>2</sup> *Fonblanque's Eq.*, book 1, ch. 1. § 8, note *f*.

<sup>3</sup> *Story's Eq.*, § 650.

<sup>4</sup> *Ib.*, § 651.

compensation to one of the parties for owelty, or equality of partition;<sup>1</sup> they may compel the cotenants to account with one another, in regard to rents and profits received, and improvements made by either of them, or may set aside to a cotenant the part which he has improved or otherwise made more valuable; the parties in interest may be brought before the Court far more extensively than they can by any processes known to the courts of law;<sup>2</sup> and the parties may compel a discovery whenever it is necessary to enable them to properly present their title. "In all cases of partition, a court of equity does not act merely in a ministerial character, and in obedience to the call of the parties, who have a right to the partition, but it founds itself upon its general jurisdiction as a court of equity and administers its relief *ex æquo et bono*, according to its own notions of general justice and equity between the parties. It will, therefore, by its decree, adjust all the equitable rights of the parties interested in the estate; and will, if necessary for this purpose, give special instructions to the commissioners, and nominate the commissioners, instead of allowing them to be nominated by the parties."<sup>3</sup> Courts of equity may also take into consideration the equities of strangers to the original cotenancy, and make such a partition as will protect those equities. This is particularly the case where one of the cotenants has conveyed some part of the lands of the cotenancy, by metes and bounds, in severalty. In such case, if it can be done without prejudice to the original cotenants who did not join in the conveyance in severalty, a court of equity will make such a partition as will secure to the grantee in severalty the part conveyed to him.<sup>4</sup> "It is upon some or all of these grounds, the necessity of a discovery of titles, the inadequacy of the remedy at law, the difficulty of making the appropriate and indispensable compensatory adjustments, the peculiar remedial processes of courts of equity and their ability to clear away all intermediate obstructions against complete justice, that these Courts have assumed a general concurrent jurisdiction with courts of law in all cases of partition. So that it is not now

<sup>1</sup> Story's Eq., § 654.

<sup>2</sup> Story's Eq., § 656.

<sup>3</sup> Story's Eq. Jur., § 656 b.

<sup>4</sup> Story's Eq. Jur., § 656 c.

deemed necessary to state, in the bill, any peculiar ground for equitable interference."<sup>1</sup> It was said, in a recent decision made by Chancellor Zabriskie of New Jersey, that "the peculiarities of an equitable partition are, that such part of the land as may be more advantageous to any party on account of its proximity to his other land, or for any other reason, will be directed to be set off to him if it can be done without injury to the others; that when the lands are in several parcels, each joint owner is not entitled to a share of each parcel, but only to his equal share in the whole; that where a partition exactly equal cannot be made without injury, a gross sum or yearly rent may be directed to be paid for owelty or equality of partition, by one whose share is too large to others whose shares are too small; and that where one joint owner has put improvements on the property, he shall receive compensation for his improvements, either by having the part upon which the improvements are assigned to him at the value of the land without the improvements, or by compensation directed to be made for them."<sup>2</sup>

§ 426. **Partition of Personalty.**—The common law, as we have already shown, provided no means of redress in behalf of a cotenant of personalty as against another cotenant thereof, unless the latter had been guilty of an actual or practical conversion, or of an actual or practical destruction, of the common property.<sup>3</sup> The inattention of the common law to this species of property was carried still farther. Part owners in addition to being without any legal remedy by which either could enforce a fair and equitable use and enjoyment of their common chattels, were also without any legal means of compelling partition thereof. Neither the common law nor the statutes of Henry VIII., nor of Wm. III., had any applicability to personal property.<sup>4</sup> The necessity of some remedy by which partition of this species of property could be compelled was much greater than in the case of real estate; for real estate was susceptible of a common possession and enjoyment, and in case of a total exclusion of either cotenant, he had his remedy at law by an

<sup>1</sup> Story's Eq. Jur., § 658.

<sup>2</sup> See Chapter XIII.

<sup>3</sup> Hall v. Piddock, 21 N. J. Eq. 314.

<sup>4</sup> Allnatt on Partition, 48.

action of ejectment. The entire absence of any remedy at law induced Courts of Chancery to take jurisdiction of actions for the partition of personal property. At what time or under what circumstances this jurisdiction was first assumed we are unable to state; but that it existed and was exercised by the Courts of Chancery both in England and in the United States is undisputed.<sup>1</sup> "A court of equity is competent to give relief in such cases, by decreeing a partition of the property, or a sale thereof where such partition is impracticable, and a division of the proceeds. The powers of a court of equity were conferred and exist to meet just such cases, where no adequate remedy exists at law."<sup>2</sup> The same reason which induced Chancery to take jurisdiction of actions for the partition of personal property, namely, the want of any adequate remedy at law, induced it to exercise this jurisdiction over a class of cases with which it would not have proceeded had the subject-matter of the action consisted of real estate. This class embraced all those cases in which the plaintiff's title to the property was denied by the defendant. When real estate was the subject of partition in Chancery, and the plaintiff's title was put in issue, he was required to establish it at law. But there was no method by which a cotenant of personalty could litigate his title with another cotenant. Therefore, when, in a partition in Chancery, the defendant denied the title of demandant to personal property, and claimed such property in severalty, the demandant was not sent to law to establish his title. He was not required to attempt an impossibility. The Court of Chancery proceeded notwithstanding the disputed title, and heard and determined all issues made by the respective parties in reference thereto;<sup>3</sup> and if, as the result of its investigation, it found the parties to be cotenants, it proceeded to make partition among them according to their respective rights.<sup>3</sup>

§ 427. **Difference between a Judgment and a Decree of Partition.**—By the final judgment entered in proceedings for

<sup>1</sup> *Smith v. Smith*, 4 Rand, 102; *Conover v. Earl*, 26 Iowa, 167; *Tripp v. Biley*, 15 Barb. 334; *Fobes v. Shattuck*, 22 Barb. 568; *Marshall v. Crow's Admr.* 29 Ala. 279.

<sup>2</sup> *Tinney v. Stebbins*, 28 Barb. 290.

<sup>3</sup> *Weeks v. Weeks*, 5 Ired. Eq. 118; *Edwards v. Bennett*, 10 Ired. 363; *Smith v. Dunn*, 27 Ala. 316.

partition at common law, the title to each allotment was vested in the person to whom such allotment had been made. No conveyance from any of the cotenants was necessary to divest him of his title to the portions not allotted to him. The judgment itself operated as a conveyance, and no other or further muniment of title was necessary or possible as the consummation of a compulsory partition at law. There were interests which could not be bound by compulsory partition at law. As to these interests, the final judgment had no effect. But as to the interests and the parties against which the judgment could operate, it operated as a final and effective partition, needing for its validity and effect no further transfer or ratification. The courts of the common law proceeded on the theory that by their judgment they could, as to all the parties before them, deal with the title to the land. But courts of equity never professed to act directly on the title. Their decrees operated *in personam* only. A decree of partition did not purport to invest the parties with title to their several allotments. The final action of a court of equity in reference to a partition was based upon the hypothesis that it was just and equitable that a certain allotment should be made between the parties. The Court therefore directed that the parties should do that which it had determined they ought to do; in other words, that they should make partition between one another by executing mutual conveyances. Without such conveyances, the legal title to the property remained unaffected. A partition in Chancery, like a voluntary partition made by the parties, must be consummated by mutual conveyances. Therefore, no effectual partition can be had in equity against any person not competent to execute a conveyance. "It may therefore be stated as a general proposition, that partition will be decreed for and against such persons as are able to convey their undivided shares, for the purposes of completing the partition. If persons seized of particular estates, together with the reversioners or remainder-men, are made parties, partition may well be made, because they together are competent to convey the whole interest. But if the reversioner or remainder-man is not joined, then, although partition will be decreed, because the particular ten-

ant would be entitled to it at law, yet it will be only of temporary duration."<sup>1</sup>

§ 428. **Jurisdiction over Partition in the United States.**—In England, compulsory partition was accomplished by one of three methods: namely, by the writ of partition at common law, by proceedings in Chancery, or by act of Parliament. We know of no instance in the United States in which partition has ever been made directly by the legislative department of government. But while we have not used all the means employed for the purposes of making compulsory partition in England, we have entrusted jurisdiction over partition to a number of courts which never exercised any similar jurisdiction in the mother country. In most of the States, the courts charged with the settlement of the estates of deceased persons have authority to make partition of such estates among the heirs or devisees of the deceased according to their respective interests. In some of the States, such courts may make complete partition although the deceased was a tenant in common, and others are therefore co-owners with his heirs of the property to be divided. Independent of enactments in reference to the distribution and partition of estates of deceased persons among their heirs, the compulsory partition of estates held in cotenancy has been made the subject of statutory regulation in every State in the American Union. These statutes, in their general features, are reenactments of the law as it previously existed at common law or in Chancery. They provide for an application to some specified court by a complaint or petition, showing that the applicant and the defendant are cotenants, and the respective interests of each; for the summoning of the defendant to answer such complaint or petition; for an interlocutory judgment or order determining the interests of each of the parties; for the appointment of commissioners to make the allotments among the cotenants according to their moieties as ascertained by the interlocutory judgment; for a sale of the property in case parti-

<sup>1</sup> Allnatt on Partition, 91; Whaley v. Dawson, 2 Schoales & L. 372.



tion thereof cannot be made without great injury to the rights of the cotenants; and for a final judgment, either confirming the allotments made by the commissioners or confirming the sale made when it has been deemed best not to partition the lands by allotment. In some of the States, the jurisdiction of the proceedings authorized by these statutes is confided to courts of law; in others, to courts of equity; and in a few of the States, the applicant has, as in England, his election whether he will proceed at law or in equity. The remedy thus created by statute is, we think, generally, but not universally, considered as cumulative, and as in no way divesting courts of equity of their jurisdiction over the same subject-matter. The Superior Court of Arkansas, in speaking of the statute of that State, in reference to compulsory partitions, said: "The statute but cumulates the remedy; and if, nevertheless, a party should elect to seek his remedy in Chancery, as these parties seem to have done, he is entitled to such as the Chancellor can afford him."<sup>1</sup> In Missouri, "the statutory mode of partition has never been supposed to divest Courts of Chancery of their jurisdiction in suits for partition."<sup>2</sup> In New Hampshire, it was held that Chancery still had jurisdiction, because "there are no negative words in the statute providing for a partition upon petition, and the partition of real estate is an undoubted branch of equity jurisdiction."<sup>3</sup> But in Massachusetts, in a case where the decision of the question was unnecessary, it was said that a bill in equity for a partition could not be sustained because the statute provided an adequate and complete remedy.<sup>4</sup>

<sup>1</sup> *Patton v. Wagner*, 19 Ark. 233.

<sup>2</sup> *Spitts v. Wells*, 18 Mo. 471.

<sup>3</sup> *Whitten v. Whitten*, 36 N. H. 332. See also *Baily v. Sissan*, 1 R. I. 233.

<sup>4</sup> *Whiting v. Whiting*, 15 Gray, 504; *Beeler's Heirs v. Bullitt's Heirs*, 3 A. K. Marsh. 283; *The Farmers v. Respass*, 5 Monr. 564. But in California, it has been said, "there is no such thing under our system of pleading and practice as a suit in equity for partition distinct from the proceeding provided for in the act." *Gates v. Salmon*, 35 Cal. 597.

The following note is intended to show what Courts, in the respective States, have jurisdiction of proceedings for compulsory partition, not including proceedings for the distribution and partition of the estates of deceased persons among the heirs thereto:

The statute of *Alabama*, in regard to partition, gives jurisdiction to the Judge of



§ 429. **Proceedings in Courts having Jurisdiction in Equity, and also at Common Law, and by Statutes.**—In several of the States, the Courts designated by statute to exercise authority over suits of partition, are Courts having both a common law and a Chancery jurisdiction. When proceedings to compel partition are pending in such Courts, or even after such proceedings have been consummated, the question must frequently arise whether the jurisdiction which the Court has exercised or is exercising is a common law jurisdiction, a Chancery jurisdiction, or a special statutory jurisdiction. Thus, the statute regulating partitions in Iowa, passed soon after the admission of that State into the Union, gave jurisdiction to the District Court. This Court had gen-

Probate, upon application made to him in writing. (Rev. Code, ed. 1867, sec. 3105.) The power conferred by this statute "does not prevent a resort to any other legal mode of obtaining partition of lands. (Ib., sec. 3119.) In *Arkansas*, jurisdiction of statutory proceedings for partition is vested in the Circuit Court (Comp. Laws, ed. 1858, p. 811, sec. 1); but the statutory remedy is regarded as cumulative only. (*Patton v. Wagner*, 19 Ark. 233.) In *California*, complaints for partition must be filed in the District Court. (Code C. P., sec. 755.) In *Connecticut*, "the Superior Court, as a court of equity, may, upon the petition of any person interested, order partition of any real estate held in joint-tenancy, tenancy in common, or coparcenary." (Rev. Code of 1866, p. 398, sec. 38.) Writs for the partition of real estate, held in joint-tenancy or tenancy in common, may, in the State of *Delaware*, be issued by the Superior Court of the county (Rev. Code, ed. 1874, p. 527, sec. 3); or either cotenant may prefer a petition to the Chancellor of the State, who thereupon has jurisdiction to proceed to make partition. (Ib., p. 528, sec. 8.) The statute of *Florida* provides that "suits or actions for the partition or division of real estate may be instituted by bill or petition in the Circuit Courts of this State; and that the proceedings in such suits or actions for partition shall be governed by the ordinary rules of proceedings in Courts of Chancery of this State, except as herein otherwise provided." (Bush. Dig., p. 616, sec. 1.) The same statute (secs. 13 to 16) gives the same Court jurisdiction over suits for the division of personal property. In *Georgia*, the statutory mode of partition is accomplished in the Superior Courts of the respective counties (Code, sec. 3996); but "equity has jurisdiction in cases of partition whenever the remedy at law is insufficient; or peculiar circumstances render the proceeding in equity more suitable and just." (Ib., sec. 3183.) Jurisdiction over personal property is vested in County Judges. (Ib., sec. 295.) For decisions determining what state of facts authorizes a court of equity in Georgia in taking jurisdiction under the above provision of the Code, see *Boggs v. Chambers*, 9 Geo. 1; *Royston v. Royston*, 13 Ib. 425; *Rutherford v. Jones*, 14 Ib. 521; *Osborn v. Ordinary*, 17 Ib. 123; *Greer v. Henderson*, 37 Ib. 1. In *Illinois*, the petition for partition must be filed in a Circuit Court. (Gross. Comp. p. 469, sec. 1.) These Courts have Chancery jurisdiction. As such, they have all, and more than all, the powers in partition cases, which could have been exercised by Courts of Chancery in England. (Ib., p. 471, sec. 15.) In *Indiana*, the Circuit Courts have jurisdiction of proceedings for partition (2 Rev. St., 1852, p. 329); and in the exercise of this jurisdiction is understood to be a court of law and not of Chancery. (*Wilbridge v. Case*, 2 Carter, 36.) "The action for partition shall," in *Iowa*, "be by equitable proceedings." (Sec. 3277 of Iowa Code.) In *Kentucky*, lands are parti-

eral jurisdiction, independent of this statute, over proceedings at law and in equity. The statutory proceeding for partition was not, in express terms, made either a proceeding at law or a proceeding in equity. Some of its modes of procedure were like those employed by courts of law; others were like those common to courts of equity. One section of the statute stated that the proceedings authorized by the act were intended as a substitute for all partitions in Chancery, as well as at law, and authorized the Court to exercise equity powers, except as therein otherwise provided. Against the validity of a partition made under this act, it was contended that the District Court "acted in the partition proceedings under special authority conferred by statute, and was con-

tioned by commissioners appointed by the County Court. (Stanton's Rev. St., vol. 2, p. 100, sec. 1.) In *Maine*, partition is compelled "by writ of partition at common law." (Rev. St., 1871, p. 694, sec. 1.) The chapter of the General Statutes of *Massachusetts*, concerning the partition of lands, enacts that "persons holding lands as joint-tenants, coparceners, or tenants in common, may be compelled to divide the same, either by writ of partition at the common law, or in the manner provided in this chapter." (Rev. St., 1860, p. 698, sec. 1.) The Courts vested with jurisdiction in this chapter are the Superior Court or Supreme Judicial Court, held in the county wherein the lands lie. (Ib., sec. 2.) In *Michigan*, the application must be made "to the Circuit Court for the county in which the lands lie, by a bill in equity." (Comp. Laws, ed. 1871, sec. 6267.) In *Minnesota*, any person entitled to partition may bring an action therefor in the District Court of the proper county (Rev. 1866, p. 532, sec. 1; Rev. of 1873, p. 888); while in *Missouri*, such action must be brought in the Circuit Court. (Rev. 1865, p. 611, sec. 1.) The Revised Code of *Mississippi* provides that "the Chancery Courts of this State shall have sole and exclusive jurisdiction in all proceedings for partition, and proceedings shall in all cases be commenced in the Chancery Court of that county in which the lands, or some part thereof, sought to be divided are situated." (Code, sec. 1811.) The Statute of *Nevada*, in reference to partition, is substantially like that of California. (Comp. Laws, sec. 1327.) In *New Hampshire*, proceedings for partition according to the statutory mode, are instituted by filing a petition in the Supreme Court in the county in which the estate to be partitioned lies (Genl. Laws, ed. 1867, p. 463); but notwithstanding the statute, the remedy by bill in equity may still be pursued with success. (*Whitten v. Whitten*, 36 N. H. 326.) In *New Jersey*, an application for the partition of lands may be made "to any Justice of the Supreme Court, or Judge of any Circuit Court or court of common pleas of the county wherein such lands lie." (Nixon's Dig., 4th ed., 666.) It may also be made in Chancery. (Ib., p. 119, sec. 3, and p. 671, sec. 26.) Proceedings for partition are, in the State of *New York*, commenced by a petition in the Supreme Court, or the County Court of the county, or in the Mayor's Court of the city where the premises are situated. (Rev. St., 5th ed., vol. 3, p. 603.) In *North Carolina*, "the Superior and County Courts, and courts of equity, on petition" appoint commissioners and perform the other duties incumbent on courts in perfecting compulsory partitions. (Code of 1854, ch. 82, sec. 1.) In *Ohio*, when the premises to be partitioned are situate in one county, the proceedings must be in the Court of Common Pleas of such county; where the premises are situate in two or more counties, the proceedings may be had in the District Court "when said Court shall be in ses-

sequently *quoad hoc*, an inferior or limited court;" and therefore "that the course prescribed by the statute ought to have been observed with at least substantial exactness, and every fact necessary to show jurisdiction ought to appear on the face of the proceedings." It was also insisted that the District Court could in such proceedings act only as a Court of Chancery, and that it must therefore be shown that they were "conducted within the limits and under the regulations of equity jurisprudence." The Supreme Court, after referring to the principal provisions of the statute, and considering them in connection with the authority of the District Court independent of such provisions, concluded as follows: "The jurisdiction of the Court was threefold: 1. It was invested with all the cumulative and special powers created by the statute; 2. It retained all Chancery attributes, except as

sion in any one of the counties where a part of the premises to be divided shall be situate, or in the Court of Common Pleas in any one of the counties where a part of such premises shall be situate at the election of the demandants. (Swan's Rev. St., 590; S. & C. Rev. St., 893.) In *Oregon*, proceedings for partition are classed among suits in equity. (See Ch. 5, Tit. 5, Deady's Comp. 1864, p. 254.) In *Pennsylvania*, the Supreme Court has "jurisdiction over the whole commonwealth as to the granting and proceeding upon writs of partition." The respective County Courts of Common Pleas have and may exercise the same power as Supreme Courts as to partition. (Brightly's Purdon's Dig., 1112, secs. 1, 2.) In the county of Alleghany in said State, the District Court for the county has Chancery jurisdiction and powers in cases of partition. (Ib., 593, sec. 15.) Like jurisdiction is given to the Supreme Court for the Eastern District of Pennsylvania, and to the Court of Common Pleas of Philadelphia county, over lands within the city and county of Philadelphia. (Ib., 595, sec. 2933.) In *Rhode Island*, partition may be compelled by a suit at law, or in equity. (Genl. St., ed. 1872, p. 519.) In *South Carolina*, "the Judge of Probate may exercise jurisdiction of all petitions for partition of real estate where no dispute exists in relation to the title thereof; and when the title to such real estate is disputed, he shall refer the same to the Circuit Court for adjudication, unless the parties shall consent to his determination of the same." (Rev. St., ed. 1873, p. 531.) In *Tennessee*, partition may be made in the County, Chancery, or Circuit Courts. (St. of Tenn., ed. 1871, secs. 3266, 3267, 4201, 4205, 4233, and 4302; *Hopper v. Fisher*, 2 Head, 253; *Down v. Snelling*, 2 Heisk. 484; *Todd v. Cannon*, 8 Humph. 512.) Partition may, in *Texas*, be enforced "by such lawful method as the party seeking such partition shall choose or deem expedient." (Sayles' Tex. Pr., sec. 725; Paschal's Dig., sec. 4707.) Part owners of personal property may also be compelled to make partition thereof. (Sayles' Pr., sec. 728; Paschal's Dig., secs. 4711-4714.) The County Courts of *Vermont* are authorized to make partition of real estate in their respective counties. (Genl. St., ed. 1863, p. 353.) In *Virginia*, "the court of equity of the county or corporation wherein the estate, or any part thereof, may be, shall have jurisdiction in cases of partition." (Code of Va., p. 920, ed. 1873.) In *West Virginia*, this jurisdiction is confided to the Circuit Courts of the respective counties (Code of West Va., ed. 1868, p. 486); and this remark is equally applicable to *Wisconsin*. (Taylor's St. of Wis., p. 1678.)

otherwise provided by the act; 3. It retained all its inherent common law authority so far as it could be exercised consistently with the two preceding powers. The three jurisdictions are comprised in and are more or less exercised in all partition suits under that act. The requirements of the statute, so far as they are especially substituted for equity and common law proceedings, are paramount, but beyond such special substitution, law and Chancery interpose with unabated and general concurrent authority. Hence, we conclude that even in cases of partition under our statute, the District Court cannot be considered *quoad hoc*, as inferior or limited. The doctrine will not be questioned that the general jurisdiction of a Court cannot be taken away unless by express words of exclusion. The statute in question has only enlarged and united powers previously existing in the Court, and modified the proceedings previously existing under those powers, and therefore there is no reason why the same liberal rule should not be applicable to support the presumption that the Court acted correctly and by competent authority.”<sup>1</sup>

<sup>1</sup> Wright v. Marsh, 2 G. Greene, 104.

## CHAPTER XX.

### OF WHAT PARTITION MAY BE COMPELLED.

- General Division of the Subject, § 430.
- Property must be held in Cotenancy, § 431.
- Lands subject to Dower, § 432.
- Difficulty in making Partition, § 433.
- Incorporeal Hereditaments, § 434.
- Mines, § 435.
- Growing Timber, § 436.
- Joinder of Parcels, § 437.
- Property which Courts will not Partition, § 438.
- Of the Estates which may be Partitioned, § 439.
- Of Estates in Reversion or Remainder, §§ 440, 441.
- Agreements not to Partition, § 442.
- Partnership Property, § 443.
- Tenancy by Entireties, § 444.
- Community Property, § 445.

§ 430. **General Divisions of the Subject.**—We have now given some account of the history of compulsory partition both at law and in equity, and have shown how the jurisdiction of courts of equity, though at first exercised at rare intervals and in extreme cases, and without any other justification or authority than that arising from the notorious inadequacy of the remedy at law, and the anxiety of Chancery to compel cotenants to deal equitably with one another, grew in favor until it entirely supplanted and led to the statutory abolition of the common law writ of partition. We have also stated, in general terms, the advantages of the proceeding in equity, upon which its popularity was justly based; and have shown that in the United States the subject of compulsory partition has received legislative attention, whereby certain Courts have in each of the States been designated to exercise authority over such partitions. From

this point we shall endeavor to treat the subject of compulsory partition, so as to consider the various questions connected therewith as nearly as possible in the order in which they would ordinarily present themselves for consideration in the preparation and prosecution of a suit. When a partition has become desirable, we think the question which will first require to be determined is this: Is the property of which division is sought subject to any proceeding for compulsory partition? In attempting to furnish data by the aid of which this question can be answered, we shall consider: 1st, what subjects of ownership may be partitioned among the cotenants thereof by proceedings for compulsory partition; 2d, the cases in which, though the subject-matter of ownership may be liable to a compulsory partition, the particular estate sought to be partitioned is not; and 3d, express or implied engagements between the cotenants, by which their right to enforce partition is suspended or destroyed.

§ 431. **Property must be held in Cotenancy.**—Before proceeding to consider what subjects of ownership may be divided by means of proceedings for compulsory partition, it is here necessary to remind the reader that partition is a division of property among *the cotenants* thereof, and therefore that it is always indispensable that the subject of every compulsory partition should be held *in cotenancy*. It is also necessary here to reiterate a statement made in another portion of the work, namely, that several persons may together own a thing without being cotenants thereof.<sup>1</sup> Whenever this happens, these persons are no more entitled to an action for partition than though they were owners of distinct pieces of property. This is well illustrated by a case decided in the State of Illinois. The property sought to be partitioned was a brick building known as the Morgan House. The defendant owned portions of the ground on which the building stood, and the first story of the building, subject to the right of the plaintiff to use a specified cellar, and to pass to and from the same by passages and doors. The defendant had also the use of a well, and a right to have certain passages

<sup>1</sup> Sec. 87.

kept open for his use around and through the premises. The plaintiff, in addition to having the right to have certain passages kept open for his use, owned a portion of the ground under the Morgan House, together with all the building above the first story. "The condition of the property being so anomalous, and causing much irritation and litigation between the parties, McConnel (plaintiff) proposed to have the property valued, and he would give Kibbe (defendant) his share of the valuation, or would take from Kibbe his own share of the valuation, so that the property might be the exclusive property of the one or the other; or that a sale should be made, and the proceeds thereof divided according to their respective interests in the property, both of which propositions Kibbe declined. McConnel then filed his bill for a partition, which on the hearing was dismissed, for the reason that a Court of Chancery had no jurisdiction of the subject, there being no joint estate in the property shown, but a separate estate, in separate and distinct parts thereof, as shown by the deeds." From the decree of dismissal an appeal was taken to the Supreme Court, where a judgment of affirmance was entered. Mr. Justice Breese delivered the opinion of the Court, in the course of which he said: "The complicated nature of these several holdings is shown in the bill, and the litigation to which they have given rise, and may hereafter prompt, is unfortunate perhaps for both parties, but we are not aware of any principle of law or equity which can compel either party to dissolve the connection, or to part with his separate portion of the premises. We are satisfied neither a court of law nor equity has jurisdiction over the case as presented by these pleadings, and accord with appellee in the proposition that no power exists to compel the fusion of these estates, to be followed by a sale and finally by a distribution of the proceeds. The idea of the plaintiff in error that he and the defendant in error hold this property jointly is not supported by the title deeds. They are neither joint-tenants, tenants in common, nor coparceners, but they severally, each for himself, own distinct portions of the premises, the character of which a Court of Chancery has no power to change."<sup>1</sup>

<sup>1</sup> McConnel v. Kibbe, 48 Ill. 12.



§ 432. **Lands held subject to Dower.**—A widow entitled to dower is not regarded as a cotenant.<sup>1</sup> Where her inchoate right of dower attached anterior to the existence of the cotenancy, it cannot, in the absence of statutory provisions to the contrary, be affected by proceedings in partition. Her interest is not that of a cotenant, nor is it in any respect dependent on the interest of a cotenant. It is paramount to the cotenancy, and she may have it assigned irrespective of any voluntary or compulsory division made among the cotenants. In an early case in New York, the heirs of one Bradshaw instituted proceedings for partition to which they made his widow a defendant. She was summoned to appear, but disregarded the summons, and allowed judgment to go against her by default. Afterwards, she brought an action of dower, wherein it was held that “the proceedings under the partition act were null and void, as respects the claim of the demandant *for dower*. She was not bound to appear and plead; and her not appearing cannot prejudice her present claim. The judgment in partition could only affect her rights, if any she had, as a *joint-tenant, tenant in common, or in coparcenary*.”<sup>2</sup> The same reason which, before the assignment of her dower, exempts a widow from the operation of the law of compulsory partition, operates with equal force after such assignment has been made. Notwithstanding the assignment vests in her a present estate, it does not make her a cotenant with the heirs of her husband.<sup>3</sup> When an inchoate right of dower is attached to a moiety instead of an estate in severalty, it is not paramount to the cotenancy. It may therefore be subjected to either a voluntary<sup>4</sup> or a compulsory<sup>5</sup> partition whereby it is removed from the whole tract and attached to the purparty assigned in severalty to the husband.

§ 433. **Difficulty and hardship of making Partition.**—Physical difficulties in making a division, arising from the fact

<sup>1</sup> See sec. 108.

<sup>2</sup> *Bradshaw v. Callaghan*, 5 Johns. 80. Affirmed on this point, but reversed on others, *Bradshaw v. Callaghan*, 8 Johns. 558; also approved. *Coles v. Coles*, 15 Johns. 321; *White v. White*, 16 Gratt. 267.

<sup>3</sup> *Clark v. Richardson*, 32 Iowa, 401.

<sup>4</sup> See sec. 411.

<sup>5</sup> *Coles v. Coles*, 15 Johns. 321.



that the property sought to be divided is not partible, are rarely if ever sufficient grounds upon which to deny a partition. According to the weight of the authorities, every cotenant is entitled as a matter of right to demand a partition of the subject of the cotenancy, and this right cannot be defeated by showing that a partition would be inconvenient, injurious, or even ruinous to the parties in interest. An early case in Vermont was evidently determined upon the theory that where partition could not be made without operating, practically, as a destruction of the property, it would not be ordered. The property involved in this case, and of which partition was denied, was a saw-mill and utensils, together with the mill yard and pond.<sup>1</sup> It is quite certain that the English Courts would have evinced no hesitation in acting in a case as difficult as that referred to in Vermont. According to Mr. Allnatt, "if there is only one entire subject-matter of division, it must be severed into shares, although the difficulty of doing it should be almost insuperable, and although it should be attended with the most palpable inconvenience and even destruction;"<sup>2</sup> and certainly the authorities cited by him fully sustain the rule which he has thus announced. In the first case which he cites,<sup>3</sup> the objections to the partition made and overruled were: 1st, that the estate consisted of permitting the New River Company to lay pipes through the grounds in the part of the estate known as the Cold Bath Fields, which pipes were so arranged that they could not be partitioned; 2d, that in the Cold Bath Fields were certain water conduits, drains, and springs; 3d, that there were a great many leases expiring at different times, and a great inequality in the goodness, nature, and situation, as to pleasure and convenience, of the several houses on the estate; 4th, that if a partition were made, it would be in the power of the one having the allotment on which the bath was not situated, by digging foundations for buildings, sinking cellars, etc., to prevent the waters which supplied the bath from flowing to it, whereby the value of the bath would be destroyed. In a

<sup>1</sup> *Brown v. Turner*, 1 Aik. 353. See also *Conant v. Smith*, Ib. 67; *Miller v. Miller*, 13 Pick. 237.

<sup>2</sup> Allnatt on Partition, 85; Danl. Ch. Pr. 4th ed. 1157.

<sup>3</sup> *Warner v. Baynes*, and *Baynes v. Warner*, Amb. 589.

very difficult case on a bill for partition before Sir Thomas Clerke, Master of the Rolls, he said: "Such a bill is a matter of right, and there is no instance of not succeeding in it, but where (there) is not proof of title in plaintiff."<sup>1</sup> In a case before Lord Chancellor Eldon, the subject of partition was a house. This house was specially valuable both to the complainant and to the defendant: "to the defendant as a shop-keeper, and to the complainant as contiguous to other estates." His Lordship had no doubt what should be done, but as the partition seemed to be ruinous to the parties, and as the complainant had made an offer to buy or sell at a specified price, the case was continued "out of mercy to the parties," to "give the defendant time to come into terms." Subsequently, the defendant not coming to terms, the commission was ordered to proceed. When the commission was executed, "an exception was taken by the defendant, on the ground that the commissioners allotted to the plaintiff the whole stock of chimneys, all the fire-places, the only staircase in the house, and all the conveniences in the yard. The Lord Chancellor overruled the exception, saying, he did not know how to make a better partition for these parties; that he granted the commission with great reluctance, but was bound by authority; and it must be a strong case to induce the Court to interpose, as the parties ought to agree to buy and sell."<sup>2</sup> In the United States, the manifest hardship arising from the division of property of an unpartible nature has been generally, and almost universally, avoided by statutory provisions authorizing the sale of property when its division would tend to greatly depreciate its value, or otherwise to seriously prejudice the interests of the cotenants; but enough may be gathered from the American decisions to show that they in general indorse the English adjudications on this subject, and that the American Courts, whenever their responsibility had not been lessened by statute, followed the English Judges, and directed partitions to be made irrespective of the consequences. The Supreme

<sup>1</sup> *Parker v. Gerard*, Amb. 236. For other extreme cases, see *Norris v. Le Neve*, 3 Atk. 83; *Manaton v. Squire*, 2 Ch. Cas. 237; *Earl of Clarendon v. Hornby*, 1 P. Wms. 446; *Agar v. Fairfax*, and *Agar v. Holdsworth*, 17 Ves. 533.

<sup>2</sup> *Turner v. Morgan*, 8 Ves. 143.

Court of Maine, on an application for the partition of a mill and mill privilege, after examining the authorities then existing on the subject, said: "We come to the conclusion that if the petitioner, as he alleges, is interested with others as tenants in common in the real estate described in his petition, he may claim of right to have partition made and his share set off and divided from the rest, however inconvenient it may be to make such partition, or however much the other cotenants or the common property may be injured thereby."<sup>1</sup> This general language is in harmony with that employed both before and since in other American Courts.<sup>2</sup> Partition in some form, unless waived by an agreement between the cotenants, is something to which each has an absolute and unconditional right. In invoking the aid of a Court of competent jurisdiction to enforce this right, he need not show any special cause for the partition. That he is a cotenant and no longer wishes to remain so, is sufficient to entitle him to relief.<sup>3</sup> If the situation and character of the property are such that the Court will not order it to be divided, then it *must* be sold. For partition either by a division of the property or by its sale and a division of the proceeds, is a matter of absolute right, against which no considerations of hardship, inconvenience, or loss, on the part of the other cotenants, can prevail.<sup>4</sup> But Courts will make a division of the property whenever they can do so without great detriment to the parties in interest. When the property is not susceptible of a division so as to assign each cotenant a part to hold in severalty, a court of equity may interpose and regulate the enjoyment of the whole property in such manner as it deems most just. Partition may be made of water rights,<sup>5</sup> of mills and mill privileges,<sup>6</sup> and of mines.<sup>7</sup>

<sup>1</sup> *Hanson v. Willard*, 12 Me. 147.

<sup>2</sup> *Ledbetter v. Gash*, 8 Ired. 462; *Steedman v. Weeks*, 2 Strob. Eq. 146; *Crompton v. Ulmer*, 2 Nott & McC. 432; *Donnell v. Mateer*, 7 Ired. Eq. 94; *Scovil v. Kennedy*, 14 Conn. 360; *Smith v. Smith*, 10 Pai. 478; *Wood v. Little*, 35 Me. 110.

<sup>3</sup> *Bradley v. Harkness*, 26 Cal. 77; *Lake v. Garret*, 12 Ind. 395.

<sup>4</sup> *Hartmann v. Hartmann*, 59 Ill. 103; *Royston v. Royston*, 13 Geo. 425; *Higginbottom v. Short*, 25 Miss. 160.

<sup>5</sup> *Morrill v. Morrill*, 5 N. H. 134; *Monroe v. Gates*, 48 Me. 467; *Smith v. Smith*, 10 Pai. 470; *McGilhoray v. Evans*, 27 Cal. 96.

<sup>6</sup> *Hanson v. Willard*, 12 Me. 142.

<sup>7</sup> *Adam v. Briggs Iron Co.* 7 Cush. 365.

§ 434. **Incorporeal Hereditaments.**—Incorporeal as well as corporeal property may be the subject of proceedings for partition in equity.<sup>1</sup> Upon a bill in Chancery to have partition of an advowson by alternate presentations, the Court declared the parties entitled to partition, and directed a decree of partition to be entered requiring the plaintiff and defendant to mutually execute conveyances “to each other, so that plaintiff may hold one moiety of the advowson to him and his heirs, and the defendant the other moiety to her and her heirs, as tenants thereof in severalty respectively;” and that in such conveyance a clause should be inserted, “that the plaintiff and his heirs and the defendant and her heirs should present by alternate turns.”<sup>2</sup> To a bill seeking a partition of tithes, a demurrer was interposed, whereupon the Lord Chancellor (Hardwicke) said: “An ejectment will lie of tithes; of which execution is a writ of possession; and the sheriff may do as much on partition as on a writ of possession on ejectment. This is not casual, whether tithes will rise or not. I do not doubt but that this Court can divide them, as it may several things, which cannot at law. Overrule the demurrer therefore.”<sup>3</sup> But there are certain incorporeal hereditaments of which it seems no partition will be ordered. These are generally, if not universally, included in that class of property of which division cannot be made without prejudice to the interests of strangers to the cotenancy. They embrace reasonable estovers, corodies uncertain, piscaries uncertain, and commons *sauns nombre*.<sup>4</sup> The reason why a piscary uncertain or a common *sauns nombre* cannot be divided is that such division would multiply the interest originally granted, and inflict on the grantor a hardship never contemplated by him in making the grant.<sup>5</sup> “It seems to be well settled that common of estovers cannot be divided or apportioned. The reason given is, that it would necessarily lead to surcharging the land from which they are taken. More fuel, fences, and

<sup>1</sup> *Bailey v. Sisson*, 1 R. I. 283.

<sup>2</sup> *Bodicoate v. Steers*, 1 Dick. 69. See also *Matthews v. Bishop of Bath*, 2 Dick. 652; and *Buller v. Bishop of Exeter*, 1 Ves. Sr. 340.

<sup>3</sup> *Baxter v. Knowles*, 1 Ves. Sr. 494.

<sup>4</sup> Co. Litt. 165 a.

<sup>5</sup> *Allnatt on Partition*, 8.

buildings, would be requisite for a number of tenants than for one."<sup>1</sup>

§ 435. **Mining Interests.**—Under a statute providing that when two or more persons hold any lands, tenements, or hereditaments, as cotenants, in which one or more of them have an estate of *inheritance*, etc., any one of them may apply for a partition, it has been held that cotenants of a right to mine may apply and have their property partitioned. Thus, in New York, the owner of certain lands conveyed all the mines, ores, minerals, and metals lying in the lands, with the right to raise, work, and carry away said mines, ores, minerals, and metals, to have and to hold unto the grantees named in the conveyance and their heirs and assigns forever. An application for the partition of the estate thus granted was opposed on the ground that it was not an estate of inheritance. The Supreme Court determined that it was not only an estate of inheritance but also an estate in fee-simple; that although there cannot be two "fee-simples absolute in one and the self-same land," yet that "the mines, ores, and minerals being land, a man may have a fee-simple in them as well as he who holds the soil that remains unconveyed may have a fee-simple, for they are not the self-same land." The Court also distinguished the case before them from the case of Lord Mountjoy, referred to by Lord Coke, and showed the difference between the two cases to be this: that in Lord Mountjoy's case, the grant was of a mere permission to dig, etc., and notwithstanding this grant, the grantor might also dig *ad libitum*. The right granted as well as the right retained was uncertain; and uncertain interests could not be partitioned. But in the case before the Court, all the ores, minerals, etc., were granted. It was therefore immaterial to the grantor whether the property or right granted was thereafter held by one person or by fifty.<sup>2</sup> In California, the interests of miners in mines situate upon lands belonging to the United States have always been regarded as legal estates of freehold.<sup>3</sup>

<sup>1</sup> *Livingston v. Ketcham*, 1 Barb. 597.

<sup>2</sup> *Canfield v. Ford*, 16 How. Pr. 473; S. C. 28 Barb. 336.

<sup>3</sup> *Merritt v. Judd*, 14 Cal. 64; *Merced Mining Co. v. Fremont*, 7 Cal. 319; *Watts v. White*, 13 Cal. 324; *McKeon v. Bisbee*, 9 Cal. 142.

They are therefore liable to partition under the statute of that State, which is substantially like that of New York.<sup>1</sup> But where the interest sought to be partitioned is not a distinct right of property in the mines, but a mere license to mine in the lands of another, "it is indivisible, because a division of the right would create new rights, and would prejudice the owners of the soil."<sup>1</sup>

§ 436. **Growing Timber.**—The right to growing timber constitutes an estate very similar in its nature to that which we have considered in the preceding section. In South Carolina, the owner of certain lands, by his deed, sold and conveyed "one-half of all the timber suitable for sawing lumber on said lands together with all the right and privilege of cutting said timber, with the privilege of roads to and through the lands for the purposes of hauling said timber." The grantor and the grantee soon became involved in contention and difficulty in regard to the timber, when the latter applied to a court of equity for a partition. This the grantor resisted, claiming that the interest in controversy was not subject to partition. Upon appeal, it was held that as Chancery had jurisdiction over both real and personal property, it would order a partition, and that it was not material to inquire "what was the character of the complainant's estate—whether real or personal—whether tenement or hereditament—whether savouring of the realty or altogether personal."<sup>2</sup>

§ 437. **Several tracts or parcels of land may together form the subject-matter of a single proceeding for compulsory partition.**<sup>3</sup> But in order to justify the union of several parcels in one suit, each parcel must be owned by the same persons.<sup>4</sup> If, however, the cotenants of each tract be the same, it is not essential that the interest of each one should be of the same quantity in each tract. Hence, A, being the owner of two-thirds of Black Acre and one-third of White Acre, may, in one suit, compel partition of both tracts against

<sup>1</sup> Hughes v. Devlin, 28 Cal. 505; Rockwell on Mines, 548.

<sup>2</sup> Steedman v. Weeks, 2 Strob. Eq. 146.

<sup>3</sup> Hagar v. Wiswall, 10 Pick. 152.

<sup>4</sup> Kitchen v. Sheets, 1 Carter, 188; Brownwell v. Bradley, 16 Vt. 106; Hunnewell v. Taylor, 3 Gray, 112.

B, who owns one-third of the former tract and two-thirds of the latter.<sup>1</sup>

§ 438. **Property of which Partition will not be Ordered.**—As neither mere difficulty in making a division of property, nor inconvenience, nor pecuniary loss likely to be produced by the division or sale thereof, suffice to bar a cotenant's right to partition, it is evident that if a bar to such right anywhere exists, it is useless to seek for it either in the non-partible character of the subject of the cotenancy, or in considerations having reference to the pecuniary welfare of the cotenants. We think that if any species of corporeal property is not now subject to proceedings for compulsory partition, it embraces only those things the division of which would be against public right or policy, or would tend to impair some paramount right existing in a stranger to the cotenancy, or would outrage the public sense of propriety, decency, and good morals. Of the things which cannot be divided because the division would work detriment to the public, Lord Coke produces an instance where he says: "If a castle that is used for the necessary defence of the realme, descend to two or more coparceners, this castle might be divided by chambers and roomes, as other houses be. But yet, for that it is *pro bono publico et pro defensione regni*, it shall not be divided."<sup>2</sup> Lord Coke also mentions the following instance in which partition cannot be made because it would prejudice the rights of a stranger to the cotenancy: "The lord *Mountjoy*, seized of the mannor of *Canford* in fee, did by deed indented and inrolled bargaine and sell the same to Browne in fee, in which indenture this clause was contained: Provided alwayes, and the said Browne did covenant and grant to and with the said lord Mountjoy, his heires and assignes, that the lord Mountjoy, his heires and assignes, might dig for ore in the lands (which were greate wasts) parcell of the said mannor, and to dig turfe also for the making of allome. And in this case three poynts were resolved by all the judges. First, that this did amount to a grant of an interest and inheritance to the lord Mountjoy to digge, &c.

<sup>1</sup> *Halton v. Earl of Thanet*, 2 W. Bla. 1134; *Hunnowell v. Taylor*, 3 Gray, 112.

<sup>2</sup> *Co. Litt.* 165 a.



Secondly, that notwithstanding this grant, Browne his heires and assignes might dig also, and like to the case of common *sauns number*. Thirdly, that the lord Mountjoy might assigne his whole interest to one, two, or more; but then, if there be two or more, they could make no divission of it but work together with one stock; neither could the lord Mountjoy assigne his interest in any part of the wast to one or more, for that might work a prejudice and a surcharge to the tenant of the land; and therefore if such an incertaine inheritance descendith to two coparceners, it cannot be divided betweene them.”<sup>1</sup> An action of partition brought in Pennsylvania by one church against another seeking the division or sale of a graveyard, furnishes a good illustration of a species of property over which Courts will refuse to act, because, in so doing, they would outrage the public sense of propriety and decency. In the case referred to, the evidence disclosed that the two religious corporations had at an early period united their means, and had thereby procured certain real estate; that they, in pursuance of their original design, erected a church on their land and used the same in common; that the lands adjacent to the church had long been used as a graveyard; and finally, that the parties were no longer able to use their property without discord and contention. After stating the evidence, Woodward, J., delivering the opinion of the Supreme Court, said: “But what can the law do for parties in such unhappy circumstances? Divide their property, say these plaintiffs. The law of partition in Pennsylvania is adapted to every exigence of tenancies in common; for, if the property cannot be parted without prejudice, it may be put into the market and sold, and in general partition is a right of tenants in common. Yet circumstances of their own creation will sometimes induce the Courts to deny them this right, a striking instance of which may be seen in *Coleman v. Coleman*, 7 Harris, 100. Here we have circumstances essentially different, but equally dissuasive from granting partition. The members of two religious societies, under articles of association which look to a permanent and interminable union, erect a church and establish a burying-ground.

<sup>1</sup> Co. Litt. 165 a.



A whole generation have worshipped in the church and now sleep in that ground. Their children and successors being unable longer to enjoy the house of worship together, it is proposed to make partition. The Lutheran portion object to this, on the ground that they are unable to take the property at a valuation and pay for it, and are unwilling that the altar and the graves of their fathers should be brought to public vendue. We think their objection well grounded and worthy of respect. The *church* could not be divided, and to separate it from the burial-places would only be a species of sacrilege, but would materially impair the value of both parts of the property. The only form in which the partition asked for could be made would be by public sale; and what would these graves, of inestimable value to surviving relatives, fetch in market? They would prove a prejudice to the property and would depreciate its price. And then, in the hands of a purchaser, they would be almost sure of desecration. Pennsylvania, with a refined and elevated sense of what is due to both the dead and the living, has forbidden, by statute, the opening of streets, lanes, alleys, or public roads, through any burial-ground or cemetery, and has provided a penalty for wilful injuries done to graveyards—not only to the tombstones and fence-railings, but even to the shrubs and plants which bereaved love cultivates in such places. The sentiment is sound, and has the sanction of mankind in all ages which regards the resting-place of the dead as hallowed ground—not subject to the laws of ordinary property, nor liable to be devoted to common uses. We do but express the concurrence in this sentiment which we feel, when we hold that a church and burial-ground situated as these now under consideration, and owned by distinct religious societies as tenants in common, are not within the spirit and meaning of the statutes of partition.”<sup>1</sup>

§ 439. **Of the Estates which may be Partitioned.**—The statute of 31 Henry VIII., conferring upon joint-tenants and tenants in common the right to partition, was limited in its operation to estates of inheritance in manors, lands, tene-

<sup>1</sup> Brown v. Lutheran Church, 23 Penn. St. 500.

ments, and hereditaments. The remedy given by this statute was analogous to that before open to parceners by the writ of partition.<sup>1</sup> The statute of 32 Henry VIII. extended the remedy to estates for term of life or years, and also to estates in which some of the cotenants held for term of life or years and others held estates of inheritance. At the common law, none but parties having estates in possession were bound by the judgment. It could not affect estates in remainder or contingency.<sup>2</sup> Estates at will were not within either of the statutes referred to; therefore, no writ of partition could be sued out against the tenant of such an estate. "A copyholder, therefore, although of inheritance, shall not have writ under these statutes. In short, no person can have it, unless his estate be, at least, one for years, in *freehold* lands properly so called, as contradistinguished from lands held by base tenure."<sup>3</sup> Courts of equity, as has been shown,<sup>4</sup> on account of the absence of any remedy at law, have long assumed and exercised jurisdiction over the partition of personal property. A similar reason might have justified a similar assumption in the case of copyhold estates. But, notwithstanding some doubts expressed upon the subject, it seems clear that Chancery never exercised any authority over copyhold estates,<sup>5</sup> (except when they were connected with freehold estates,) until jurisdiction was granted to it by statute 4 and 5 Vict., ch. 35, sec. 85. According to Mr. Allnatt, it may now "be stated as a general proposition, that partition will be decreed for and against such persons as are able to convey their undivided shares, for the purpose of completing partition. If persons seized of particular estates, together with the reversioners or remainder-men, are made parties, partition may well be made, because they are together competent to convey the whole interest. But if the reversioner or remainder-man is not joined, then, although partition will be decreed, be-

<sup>1</sup> Allnatt on Partition, 57.

<sup>2</sup> Bipsham's Principles of Equity, sec. 488. When partition was made by tenants for life or for years, it was necessary, to make the partition absolute, to have another writ against the remainder-man, when his estate came into possession. Allnatt, 64.

<sup>3</sup> Allnatt on Partition, 62

<sup>4</sup> See sec. 426.

<sup>5</sup> Scott v. Fawcett, 1 Dick, 299; Horncastle v. Charlesworth, 11 Sim. 315; Jope v. Morshead, 6 Beav. 213.

cause the particular tenant would be entitled to it at law, yet it will only be of temporary duration."<sup>1</sup> Courts of equity regard equitable titles as true and perfect. They will therefore recognize those titles and deal with them in proceedings for partition.<sup>2</sup> In one respect, their jurisdiction over such titles is more ample than over legal titles; for if a dispute arises in reference to a legal title, a court of equity will not undertake to determine it, but will send the parties to law to have the doubtful legal title litigated and settled. But if in the progress of a partition in Chancery, a question arises in reference to an equitable title, it cannot be sent to law, because it is the proper province of a court of equity to investigate equitable titles, and if found worthy, to give them its recognition and support.<sup>3</sup> Hence, in one instance, a court of equity decreed a partition of lands held by the defendant adversely to the plaintiff, because the question between the parties was in reference to the equitable title, and the Court having obtained jurisdiction for the purpose of determining that question, could see "no reason for suspending the proceedings short of complete justice between the parties."<sup>4</sup> Equity may proceed to make partition between owners of the equitable titles, without bringing before the Court those in whom the legal title is vested;<sup>5</sup> but at law, where the estate sought to be divided is equitable only, no writ of partition can be sustained.<sup>6</sup>

§ 440. **Estates in Reversion or Remainder.**—The mischief attending the ownership of estates in cotenancy, which the various statutes of partition were intended to avoid, was that which arose from disputes in regard to the occupancy of lands. Independent of these statutes, it was possible for each cotenant to harass the others beyond endurance through a vicious assertion of his undoubted right to be in possession

<sup>1</sup> Allnatt on Partition, 91.

<sup>2</sup> Hitchcock v. Skinner, 1 Hoff. Ch. 24.

<sup>3</sup> Coxe v. Smith, 4 Johns. Ch. 276; Cartwright v. Pultney, 2 Atk. 380; Swan v. Swan, 8 Price, 518, Welch v. Anderson, 28 Mo. 293; Herbert v. Smith, 6 Lans. 493; Faust v. Moorman, 2 Carter, 20; Carter v. Taylor, 3 Head, 35; Leverton v. Waters, 7 Cold. 23; Almony v. Hicks, 3 Head, 39.

<sup>4</sup> Hosford v. Merwin, 5 Barb. 62.

<sup>5</sup> Selden v. Vermilya, 2 Sandf. 577; S. C. 9 N. Y. Leg. Obs. 83.

<sup>6</sup> Coale v. Barney, 1 G. & J. 341.

of every part of the lands of the cotenancy. No one of the cotenants could use or cultivate any specified part of the common lands to the exclusion of his fellow-tenants; and hence neither cotenant had that incentive to improve or even to cultivate the lands of the cotenancy which would invariably attend a tenancy in severalty. Through the operation of the writ of partition, it was intended that the undivided possession should be severed, and that each person having the right to be in possession of the whole property should exchange that right for one more exclusive in its nature, whereby, during the continuance of his estate, he should be entitled to the sole use and enjoyment of some specific purparty. But persons having estates in land under which they had no right to possession, were, in no respect, inconvenienced or damnified by the undivided possession held by others. Tenants of estates in reversion or in remainder were not permitted to interfere with tenants in possession, because the former had no reason to interest themselves concerning the manner in which the estates of the latter should be enjoyed. On the other hand, it is equally certain that tenants in possession were at law in their power to compel partition confined to their particular estates, and could do nothing towards effecting a severance of estates in remainder or reversion. It was the invariable rule at the common law, and also under the English statutes, that estates in remainder or reversion could not be divided by proceedings for a compulsory partition; and this is still the rule under some of the American statutes upon this subject.<sup>1</sup> Equity, in assuming concurrent jurisdiction with courts of law over the subject of partition, generally refused to extend its authority over any species of property of which no partition could be had at law. To this rule personal property formed an exception. The quotation made in the preceding section from Mr. Allnatt's *Treatise on Partition*, stating that partition will be decreed for and against such persons as are able to convey their respective interests, is, so far as estates in reversion or remainder are concerned, cer-

<sup>1</sup> *Stevens v. Enders*, 1 Green. N. J. 273; *Culver v. Culver*, 2 Root, 278; *Packard v. Packard*, 16 Pick. 194; *Ziegler v. Grim*, 6 Watts, 106; *Baldwin v. Aldrick*, 34 Vt. 532; *Brown v. Brown*, 8 N. H. 94; *Norment v. Wilson*, 5 Humph. 310; *Robertson v. Robertson*, 2 Swan, 201.

tainly inaccurate. There is no doubt that in England a reversioner or remainder-man cannot maintain a suit in equity for partition, and that equity will not take jurisdiction to partition an estate in reversion or remainder disconnected from an estate in possession.<sup>1</sup>

§ 441. **States in which Partition may be had of Estates in Reversion or Remainder.**—In New York, after several decisions to the contrary, it was determined that the statutes of that State authorized a partition to be made at the instance of a tenant in common of a vested remainder, and this whether the present estate were held in cotenancy or in severalty.<sup>2</sup> But a tenant in common of a contingent remainder, as he may never have any interest in the property, is not entitled to a partition even in New York.<sup>3</sup> In Illinois, the statute provides for partition, on the petition of any one or more of the persons interested; and that the petition shall set forth the rights and titles of all the parties in interest, including tenants for years, for life, by curtesy, or in dower, and of persons entitled to the remainder or reversion. It was held that as this statute contained nothing requiring that the applicant should have an estate entitling him to be in possession, and as it clearly contemplated bringing before the Court the owner of the life estate, it must be construed as authorizing a reversioner or remainder-man to maintain a suit for partition against the owner of the remaining undivided interest in reversion or remainder, although the whole premises were subject to an unexpired life estate.<sup>4</sup> A like construction was given to a similar statute in Minnesota.<sup>5</sup>

§ 442. **Agreements not to Partition.**—We have spoken of the right of partition as an absolute right incident to every species cotenancy, (except that dependent for its creation and continuance on the marital relations of the cotenants,) and as yielding to no considerations of hardship or inconvenience. In so speaking, we have had in view the law

<sup>1</sup> *Evans v. Bagshaw*, L. R. 8. Eq. 469; affirmed, L. R. 5 Ch. Ap. 340.

<sup>2</sup> *Blakely v. Calder*, 15 N. Y. 623.

<sup>3</sup> *Woodruff v. Cook*, 47 Barb. 309.

<sup>4</sup> *Scoville v. Hilliard*, 48 Ill. 453; *Hilliard v. Scoville*, 52 Ill. 449.

<sup>5</sup> *Cook v. Webb*, 19 Minn. 170.

of cotenancy and partition as it exists independent of express or implied agreements between the respective parties in interest. There are cases from which it might be inferred that the right to partition cannot be waived, and that, to an application for partition, no other defense will be noticed by the Courts than that the parties do not hold the property together and undivided. In Massachusetts, the defendants presented a plea in bar, by which they denied the petitioner's right to partition, because the lands to be divided belonged to the proprietors of the common and undivided lands on the Island of Nantucket; that such proprietors, "from the time whereof the memory of man is not to the contrary," had been an ancient body politic and corporate, and had, during all the time, been invested with the exclusive right, at their corporate meetings, to divide, dispose of, manage, and improve their common lands in such manner as they should deem just and equitable; and that, during all such time, it had never been competent for any member of the corporation to have any of the lands set off or divided to him by petition for partition. In reference to this plea, the Court said: "Such a prescription as is attempted to be set up is against the law of the land, and cannot be supported. It is essential to an estate in common to be subject to partition."<sup>1</sup> In this case, it is true, no agreement against partition was attempted to be asserted. But the theory upon which the Court acted seems to be this: that anything militating against the right of partition is so repugnant to the essential characteristics of cotenancy that it cannot be allowed to prevail under any circumstances. The civil law refused to enforce agreements perpetually waving the right to partition, and gave an excellent reason for so refusing. According to Domat: "It is always free for every one of those who have anything in common among them to divide it, and although they may agree to put off the partition to a certain time, yet they can make no such agreement as never to come to a partition. For it would be contrary to good manners that the proprietors should be forced to have always an occasion of falling out, by reason of the undivided possession of a common

<sup>1</sup> Mitchell v. Starbuck, 10 Mass. 11.

thing.”<sup>1</sup> It may be that an agreement never to partition a particular parcel of real or personal property, if supported by no other consideration than the mutual compact between the parties, would be ignored in England and in the United States, for the reason suggested by Domat, where the rights of the respective parties remained as before the agreement, and neither had, because of his reliance upon such agreement, done nor forbore to do some particular act. But we think the decided preponderance of authority supports the proposition, that the general principle of law that the right to partition is absolute must be confined “in its application to ordinary joint-tenancies or tenancies in common, where the right of partition is left to result as an ordinary legal incident of such tenancy, and that it was never intended to interfere with contracts between the tenants modifying or limiting this otherwise incidental right, nor to render it incompetent for parties to make such contracts, either at the time of the creation of the tenancy or afterwards.”<sup>2</sup> But where property is purchased by two or more persons for specified purposes, and these purposes can be accomplished only by the parties continuing cotenants, and there is sufficient to establish an express or implied agreement that the property shall remain undivided, we think no Court would compel a partition to be made. To do so would be to assist the complainant in consummating a fraud upon his cotenants. In England, four persons purchased certain land; and, on the day of their purchase, executed a written agreement regulating the mode in which the land was to be laid out into lots and sold for building purposes, and providing that if either party, or his heirs, should be desirous of selling his share, it should first be offered to the other parties at a price fixed by the vendor. If the others refused to pay such price, the share might be sold to any other person, to be first approved by the rest of the cotenants. If such purchaser should be refused or rejected, then the share was to be valued by arbitration; and if the others refused to purchase at the price named by the

<sup>1</sup> Domat's Civil Law by Strahan, Part I. B. II. Tit. V. sec. 11; Code Napoleon, sec. 815; Civil Code Lower Canada, sec. 689.

<sup>2</sup> Avery v. Payne, 12 Mich. 549. See also Coleman v. Coleman, 19 Penn. St. 100; Hoyt v. Kimball, 49 N. H. 322.



arbitrators, the share might be sold at public auction. All the parties having died, the representative of one filed a bill for partition against the representatives of the others. The bill was dismissed, on the ground that the agreement was a waiver<sup>1</sup> of the right to compel partition.<sup>1</sup> In New Hampshire, several persons, desirous of erecting and managing a hotel, purchased lands on which it was to be built. The conveyance contained a provision that the property should be held without partition or division, subject to certain articles of association entered into between the proprietors. The hotel was built by the association, and after it had been occupied for several years, one of the part owners filed a petition for partition. The Supreme Court denied the partition, and decided—1st, that the proviso in the deed was not repugnant to the estate granted, “for, originally at common law a tenant in common could not be compelled to make partition, and the right given by statute being for the benefit of the party, might be waived by him;” 2d, that it was not a restraint on alienation, for each cotenant might convey his share at pleasure; and 3d, that it was not against public policy.<sup>2</sup>

§ 443. **Partnership Property.**—We have, in another part of this work,<sup>3</sup> discussed the question of the effect of partnership upon real estate held in the name of the partners as tenants in common, and have there endeavored to show under what circumstances and to what extent such real estate may be withdrawn from the operation of the law of cotenancy, and placed under the dominion of the law of copartnership. We think that whenever any property is acquired or held by two or more persons apparently as cotenants, but really under such circumstances that it is to be regarded as dedicated to partnership uses and purposes, and as liable to be taken in satisfaction of partnership obligations, it must be considered as withdrawn from the law of partition, and as continuing so withdrawn as long as the partners or their creditors have the right to insist on its being devoted to partnership uses or to the discharge of partnership liabilities. The decisions on

<sup>1</sup> *Peck v. Cardwell*, 2 Beav. 137.

<sup>2</sup> *Hunt v. Wright*, 47 N. H. 399.

<sup>3</sup> See secs. 111 to 120.



this subject are less satisfactory than we had reason to expect; and some of them, though too vaguely expressed to be clearly understood, seem to militate against the position we have taken. Thus, in California, a complaint was filed for the partition of certain mining claims and of a certain mining ditch. The defendant answered that he and the plaintiff were partners in the business of mining; that they carried on such business with said mining ground and ditch; and that said ground and ditch constituted the capital stock and means upon and by which the partnership business was carried on, to the great benefit and advantage of plaintiff and defendant. To this answer a demurrer was interposed and sustained. Whereupon, the defendant declined to amend, and the Court, without hearing any evidence, gave judgment for the plaintiff, in accordance with the prayer of his complaint. On appeal, the action of the subordinate Court in sustaining this demurrer was approved, in an opinion from which the following is an extract: "It is urged that the property in controversy being used as partnership property, an action for partition will not lie, and that a suit in equity must be brought to dissolve the partnership, and for an account of the partnership business. It does not appear in this case that any suit in equity is necessary to settle and adjust the business of the partnership. The mere fact that real estate, owned by persons as tenants in common, or even as partners, is used in partnership business, affords no valid objection to an action to partition the same between the owners."<sup>1</sup> In this case, the pleadings disclosed the existence of a partnership; that such partnership not only embraced the property to be divided, but that such property was the chief or sole matter with which the partnership dealt, and out of which its business and profits grew. The partition was therefore equivalent to a compulsory dissolution of the copartnership made in the absence of any disclosed cause. On the other hand, the English Courts regard real estate constituting part of the assets of a trading or commercial partnership, as being so entirely converted into personalty that it must, at the termination of the partnership, be disposed of like other

<sup>1</sup> Hughes v. Devlin, 23 Cal. 507.

personal estate, and cannot be the subject of proceedings for compulsory partition.<sup>1</sup> In America, the conversion of realty into personalty, by virtue of its becoming the property of a partnership, is usually regarded as operative only so far as may be necessary to discharge the liabilities of the firm, either to third persons or to one of its members.<sup>2</sup> Therefore, in this country, when the firm has been dissolved, or when it is evident that it can no longer continue its business, real estate, constituting part of its assets, may be divided by compulsory partition, if it be shown that such realty will not be required to satisfy any liabilities of the copartnership.<sup>3</sup> Where real estate belonging to a partnership stood in the name of one of the partners only, and he died, it was held that the surviving partner might by one suit in equity obtain a decree declaring the realty to belong to the partnership, directing a sale of so much thereof as was necessary to pay partnership debts, and making a partition of the remainder.<sup>4</sup>

§ 444. A tenancy by entirety is dependent for its creation and continuance upon the marital relations of the cotenants. Neither can sever the tenancy and leave the marital relations intact. No tenant by the entirety could have a writ of partition against his or her spouse at common law; nor could any tenant by the entirety procure partition by proceedings in equity.<sup>5</sup> At the present day, partition of property held in entireties may be obtained in connection with a decree of divorce, or whenever, by a divorce, the legal unity of the cotenants has been destroyed. In other words, while the tenancy by entireties continues, no partition can be made; but when the tenancy has been converted into a tenancy in common, by the destruction of its peculiar and essential unity—namely, unity of person—it may like other tenancies in common be partitioned.

§ 445. Community property cannot, during the con-

<sup>1</sup> *Wild v. Milne*, 26 Beav. 504; *Crawshay v. Maule*, 1 Swanst. 495, 518; *Darby v. Darby*, 3 Drewry, 495, 501.

<sup>2</sup> See sec. 118.

<sup>3</sup> *Roberts v. McCarty*, 9 Ind. 18; *Danvers v. Dorrity*, 14 Ab. Pr. 208; *Patterson v. Blake*, 12 Ind. 436; *Jackson v. Deese*, 35 Geo. 88.

<sup>4</sup> *Gray v. Palmer*, 9 Cal. 636.

<sup>5</sup> See secs. 64, 71.

tinuance of the marital relations of its cotenants, be the subject of proceedings between them for compulsory partition, unless by such proceedings a dissolution of the marriage is also sought. But when a divorce is about to be granted, the partition of the common property becomes a proper matter for the consideration of the Court, "and is part and parcel of the decree to be rendered."<sup>1</sup> But the Court granting the divorce is not invested with exclusive jurisdiction over the partition of the common property. The parties may seek such partition in the suit for divorce, or they may defer seeking it until some future time. If, in the divorce suit, the litigation is confined to the investigation and determination of the question whether legal grounds exist for the annulment of the marriage, and if, upon the determination of that question in the affirmative, a decree of divorce is rendered, in which nothing is said about the community effects, such decree leaves the parties at liberty, at any subsequent time, to apply for partition to any Court of competent jurisdiction.<sup>2</sup>

<sup>1</sup> *Kashaw v. Kashaw*, 8 Cal. 321; *Gimmy v. Gimmy*, 22 Cal. 634.

<sup>2</sup> *De Godey v. Godey*, 39 Cal. 162.

## CHAPTER XXI.

### WHO MAY COMPEL A PARTITION.

Only Cotenants entitled to Possession, § 446.

Only Cotenants not Disseized, § 447.

Exception as to Personal Property, § 448.

Exception where Equity has Jurisdiction for some other purpose, § 449.

States permitting Disseized Cotenant to apply, § 450.

Grantee of Cotenant, § 451.

Mortgagor and Mortgagee, § 452.

Holder of Equitable Title, § 453.

Administrator and Heir, § 454.

Tenant for Life or Years, § 455.

Tenant by Curtesy and in Dower, § 456.

Infants, § 457.

Married Women, § 458.

Joinder of Applicants, § 459.

After-acquired Rights, § 460.

Cotenant by Disseizin or Tax Title, § 461.

§ 446. **Applicant must be entitled to Possession.**—If the property of a cotenancy be a proper subject for compulsory partition, and if some or all of the estates held therein be estates of which the Courts will take jurisdiction for the purpose of compelling an enjoyment in severalty, the next subject for inquiry is whether the person who proposes to file the bill or complaint for partition, is in respect to his present interest in the property, and to his present relations towards it, one of the persons authorized by law to demand its partition. An estate may be one of which Courts may take jurisdiction and compel a partition at the instance of some of the parties interested therein; and yet it may happen that the person desirous of procuring a partition, though a party interested in the property, is not one who may demand its partition. The interest of one of the part owners may be

such that he could be compelled to assent to a partition, but not such as to authorize him to demand one from the other part owners. A familiar illustration of this existed in the case of remainder-men, in proceedings for partition in Chancery. Thus a remainder-man might be brought before the Court, in certain cases, and compelled to execute a conveyance for the purpose of carrying out a decree of partition; but in no case could he institute proceedings to enforce compulsory partition. It is a general rule prevailing in England without exception, and also throughout the majority of the United States, that no person has the right to demand any Court to enforce a compulsory partition unless he has an estate in possession—one by virtue of which he is entitled to enjoy the present rents or the possession of the property as one of the cotenants thereof.<sup>1</sup> Therefore, the grantee of a deed in which the grantor reserves the right to remain in possession during his natural life, cannot maintain a suit for a compulsory partition.<sup>2</sup> So it was held that a tenant in common of lands whose moiety was held by a tenant under a lease had no right to demand partition,<sup>3</sup> although the applicant was tenant in common of the rents as well as of the reversion. But probably the weight of the authorities is the other way, and in favor of the rule that, notwithstanding a lease for years, a cotenant both of the rents and of the reversion may call for a partition.<sup>4</sup> So it is said that notwithstanding a lease from one cotenant to another, a partition could be main-

<sup>1</sup> *Brownell v. Brownell*, 19 Wend. 367; *Hoyle v. Huson*, 1 Dev. 348; *Whitten v. Whitten*, 36 N. H. 332.

<sup>2</sup> *Nichols v. Nichols*, 28 Vt. 230.

<sup>3</sup> *Hunnewell v. Taylor*, 6 Cush. 474.

<sup>4</sup> *Woodworth v. Campbell*, 5 Pai. Ch. 518; *Cook v. Webb*, 19 Minn. 172. The words of the writ of partition were "that the said A. and B. hold together an undivided — acres of land with the appurtenances, M——, of the inheritance which was ——'s, the mother of the aforesaid A. and B., whose heirs they are." "The word *hold*, in a writ, always implies a tenant of a freehold. And, therefore, the writ lies against a coparcener, notwithstanding she has made a lease for years; for she still remains tenant of the freehold. And if one coparcener make a lease for years to her companion, the former shall have a writ during the existence of the term; for though the companion is in possession of the entirety, yet she is only tenant of the *freehold* in an undivided share; and partition may be awarded with a saving of the term. But if one coparcener make a lease for life, the other shall not have a writ of partition against her, because they do not hold the freehold together; and, therefore, the writ of partition lies against the lessee for life, as tenant of the freehold." (*Allnatt on Partition*, 52-3; *Co. Litt.* 167 a.)

tained at common law against the lessee; but that "in such case, the judgment was rendered with a saving of the term."<sup>1</sup> In New Hampshire, the Supreme Court said: "The right of a party who is entitled to take advantage of a condition broken seems a much more slender title than that of a reversioner. He has but a right to enter, of which he may or may not take advantage; and if he waives the forfeiture, as he may, the partition would be without effect." A bill for partition brought by such a party was therefore dismissed.<sup>2</sup>

§ 447. **Applicant must not be Disseized.**—If the party seeking a partition have an estate in the property held by him in cotenancy with others, and such estate entitle him to apply for partition, it is next necessary to inquire concerning his relation to the property in respect to the possession thereof. Proceedings for partition were not designed as an alternative remedy with the action of ejectment. It was always necessary at common law, and is still essential under most of the American statutes, that the applicant for partition be actually or constructively in possession of the real property sought to be divided. If it be held adversely to the applicant, he must first establish his right by an action to recover possession.<sup>3</sup> "In partition, the plaintiff or petitioner must allege that he is seized, which imports a present possession as tenant in common or coparcener; and hence it is that *non insimul tenent* is the appropriate issue in partition, because the parties cannot *hold* together unless their possession as well as their titles are in common. The fact of the adverse holding by one against the other shows that they cannot hold together, and *pro indiviso*; for the party in possession holds the whole in exclusion of the others. A mere

<sup>1</sup> Hunt v. Hazleton, 5 N. H. 217.

<sup>2</sup> Whitten v. Whitten, 36 N. H. 333.

<sup>3</sup> Matthewson v. Johnson, Hoff. Ch. 560; Bonner v. The Proprietors, 7 Mass. 475; Albergottie v. Chaplin, 10 Rich. Eq. 428; Law v. Patterson, 1 Watts & S. 184; Gravier v. Ivory, 34 Mo. 523; Forder v. Davis, 38 Mo. 107; McMasters v. Carothers, 1 Penn. St. 325; Longwell v. Bentley, 3 Grant's Cas. 177; Rozier v. Johnson, 35 Mo. 331; Burnhans v. Burnhans, 2 Barb. Ch. 405; Thomas v. Garvan, 4 Dev. 224; Giffard v. Williams L. R. 5 Ch. 546; Drew v. Clemmons, 2 Jones' Eq. 314, which was for partition of slaves. "If one coparcener disseize another, during this disseizin a writ of partition does not lie between them; because they do not hold together and undivided." (Allnatt on Partition, 53; Co. Litt. 167 a.)

right of entry, if shown, will not satisfy the terms of the issue; for there is no seizin in the party who is ousted."<sup>1</sup> "The object of the proceeding in a petition for partition," as understood by the Supreme Court of Vermont, "is to turn an estate that is possessed in common into an estate in severalty, and not to furnish a mode of settling conflicting titles. It is a general rule that a petition for partition cannot be sustained on a mere right of entry. But there is a distinction between a mere possession of the plaintiff's share by a third person or by the defendant and a legal disseizin. In cases where *privity* has existed between the parties, as in case of joint-tenants or tenants in common, and one tenant ousts his cotenant by taking all the profits to himself, denying his cotenant's right, such a possession may be treated as a disseizin, for the purpose of bringing ejectment; or, he may elect to treat such possession of his cotenant as his possession, and, in that event, may maintain a petition for partition. But it would seem from the authorities, if the party in such a case is *effectually disseized*, they no longer hold the estate together, and he is barred of his remedy for partition."<sup>2</sup> The foregoing quotation correctly states the general proposition of law that an actual disseizin is a bar to the applicant's claim for partition; but in attempting to explain the difference between an ouster committed by a cotenant and one committed by a stranger to the cotenancy, it employs language liable to mislead. We deny that a possession held by one cotenant so adversely and exclusively that he is thereby made liable to an action of ejectment, differs in degree or character from the possession by which he may defeat a petition for partition. Disseizin and ouster are terms having the same signification in partition as in ejectment. In partition as in ejectment, an entry made by a tenant in common, or other cotenant, is presumed to be made in subordination to the common title, and for the benefit of all the cotenants. Such an entry, until shown to have been adverse to the common title, neither subjects the cotenant by whom it was made to an action of ejectment nor affects the power of the other

<sup>1</sup> *Clapp v. Bromagham*, 9 Cow. 561; *Witherspoon v. Dunlap*, Harper, 390; *Jenkins v. Van Schaack*, 3 Pai. Ch. 245.

<sup>2</sup> *Brock v. Eastman*, 28 Vt. 660.

cotenants to compel partition. The seizin of one cotenant, unless proved to be adverse, is the seizin of all, and either may institute proceedings for compulsory partition, though not personally in possession of the property.<sup>1</sup> The law upon this subject is correctly stated in the following extract from an opinion of the New York Court of Appeals: "Possession usually follows the legal title when no adverse possession is shown, and consequently, when the lands are unoccupied, the possession will be deemed to be in those having the title; and when one of several tenants in common is in possession, his possession will, in the absence of any act of ouster on his part, inure to the benefit of all. But even the possession of one of the tenants in common may become adverse by acts of his amounting to an exclusion of his cotenants; and if he convey the whole of the premises to a third party, and the purchaser takes actual possession, claiming the whole, it is certain that the possession of such purchaser is adverse, and is not the possession of the former cotenants of his grantor. The moment such adverse possession commences, the *holding in common is terminated*, and until the excluded parties regain their possession by the appropriate action, I do not see how they can bring themselves within the provision of the statute or the rule of the common law. It would be utterly incongruous to hold, that where ejectment would lie, the plaintiff has possession which would entitle him to bring partition. The duration of an adverse possession is material upon the trial of the question of title in an action to recover possession, but it cannot be material in determining where the possession was at the time of the commencement of the action."<sup>2</sup> A testator devised a tract of land to one of his heirs, subject to the performance of certain conditions subsequent. The devisee entered claiming under the devise, and held possession for several years. Another of the heirs then sued for partition, claiming that the conditions subsequent had not been performed, and that in consequence of such non-performance, the devise had become inoperative. The Court held that the entry under the will was clearly adverse to the

<sup>1</sup> Beebe v. Griffing, 14 N. Y. 238.

<sup>2</sup> Florence v. Hopkins, 46 N. Y. 186. See also Adam v. Ames Iron Co. 24 Conn. 235.



other heirs and not as their cotenants; and that if the conditions of the will were not performed, the heirs must establish that fact, and their consequent right to enter for condition broken, by an action of ejectment against the person in possession.<sup>1</sup>

§ 448. **Personal Property in Adverse Possession.**—The rule that when the defendant is in the adverse possession of the property sought to be divided, the plaintiff will be sent to law to establish his right to possession, has no application to personal property. In this, as in all other cases, the law does not require an attempt to accomplish the impossible. A part owner has no remedy at law to obtain possession of a chattel in the custody of another part owner, although the latter repudiates the cotenancy and claims the property in severalty. An action for partition is the proper and only remedy in such a contingency;<sup>2</sup> and that, except where a statutory remedy has been created, can only be prosecuted with success in a court of equity.

§ 449. **When Equity will act notwithstanding Adverse Possession.**—While a court of equity will not, according to a preponderance of the authorities, sustain a bill for partition against a defendant in adverse possession, yet this rule must be regarded as subordinate to the more general and beneficial rule of equity jurisprudence that “jurisdiction having once rightfully attached, it shall be made effectual for the purposes of complete relief.” Hence, when a suit is rightfully in equity, and from the adjudication there made, it appears that the parties are co-owners and entitled to partition, a decree for such partition may be made irrespective of the question whether the complainant is seized or disseized. Thus, where the defendants were in possession claiming under a will, and the complainants filed a bill to have the will construed, and for an accounting and partition, the Court held that having acquired jurisdiction for the purpose of construing the will, it

<sup>1</sup> O'Dougherty v. Aldrich, 5 Den. 388.

<sup>2</sup> Weeks v. Weeks, 5 Ired. Eq. 111; Edwards v. Bennett, 10 Ired. 361; Smith v. Dunn, 27 Ala. 316.

had authority to do complete justice between the parties by compelling an accounting and partition.<sup>1</sup>

§ 450. **States where Disseized Cotenant may have Partition.**—In some of the States, a cotenant though disseized may obtain a compulsory partition. Massachusetts was the first to adopt this rule. The case of *Barnard v. Pope*,<sup>2</sup> decided in 1817, is sometimes cited as furnishing the initial decision upon which the later decisions in the same State rest. But this case can hardly be said to affirm any general principle of law, or to decide anything except that the petitioner should have judgment. The reasoning of the Court consisted of an allusion to the inconvenience of restricting the remedy by partition; to the fact that some dispossessions did not amount to disseizins, and to the further fact that no ouster, or refusal to account for rents and profits, had been shown. This last circumstance may have controlled the judgment of the Court; and, if so, it was not inconsistent with previous authorities. The statute of Massachusetts under which *Barnard v. Pope* was determined authorized the application for partition to be made by “any person *interested with others in any lot, tract of land, or other real estate.*” Subsequently, the statute was changed so as to provide that “all persons holding land as joint-tenants, coparceners, or tenants in common, may be compelled to divide the same;” and to authorize “any one or more of the persons, so holding lands” to apply “by petition for a partition of the same.” Notwithstanding the use of the word “holding,” it was held that no actual seizin was necessary, and that it was immaterial that the applicant had been ousted, if he still had a right to the possession.<sup>3</sup> The decisions in Maine, upon this subject are in consonance with those of Massachusetts;<sup>4</sup> and this remark is equally true of adjudications made in some of the other States.<sup>5</sup>

<sup>1</sup> *Scott v. Guernsey*, 60 Barb. 178; *Hosford v. Merwin*, 5 Barb. 62. See also § 439.

<sup>2</sup> 14 Mass. 496.

<sup>3</sup> *Marshall v. Crehore*, 13 Met. 464, followed in *Wood v. Le Baron*, 8 Cush. 474.

<sup>4</sup> *Baylies v. Bussey*, 5 Greenl. 157; *Call v. Barker*, 12 Me. 325.

<sup>5</sup> *Miller v. Dennett*, 6 N. H. 109; *Tabler v. Wiseman*, 2 Ohio St. 207; *Godfrey v. Godfrey*, 17 Ind. 9; *Foust v. Mcorman*, 2 Ind. 17; *Cook v. Webb*, 19 Minn. 170; *Cuyler v. Ferrill*, 1 Abb. C. C. 181; *Howey v. Goings*, 13 Ill. 108; *Overton's Heirs v. Woolfolk*, 6 Dana, 374.

§ 451. **Transfer of Right to Partition.**—The conveyance of his moiety made by any cotenant is also a transfer of his right to partition. After such conveyance, unless he subsequently acquires some moiety of the lands of the cotenancy, he cannot demand a partition for any purpose.<sup>1</sup> His grantee acquires the right to compel a partition, and usually succeeds to such right with all the limitations and privileges attached to it when it was in the hands of the grantor.<sup>2</sup> A cotenant in New York, failing in business, assigned his moiety to certain persons for the benefit of his creditors. These assignees applied for partition. Their right was contested, on the ground that they were simply invested with a power of sale; and that such a power did not authorize a partition. The Supreme Court granted the petition, on the ground that the assignees had something beyond a power of sale—in this, that they were absolutely seized of the legal estate.<sup>3</sup> But where the estate of a cotenant, or his right to possession, is transferred for a temporary purpose, or the transfer is defeasible, the Courts are not inclined to sustain the demand of the transferee for a compulsory partition. Thus, in Massachusetts, where a judgment creditor may levy upon and take possession of the real estate of his debtor and may enjoy the rents and profits of such estate, but his title is liable to be divested by a redemption made within one year, he cannot petition for partition, until, through lapse of time, his estate has become indefeasible. The debtor having the right to redeem ought to be able to do so without being subjected to the expense of partition, and without being obliged to accept a different estate from that upon which the levy was made.<sup>4</sup> At the common law, as the right to compulsory partition was restricted to coparceners, it could not be transferred by con-

<sup>1</sup> *King v. Howard*, 27 Mo. 21.

<sup>2</sup> *Ragan's Estate*, 7 Watts, 442; *Stewart's Appeal*, 56 Pa. St. 242; *Collamer v. Hutchins*, 27 Vt. 734.

<sup>3</sup> *Van Arsdale v. Drake*, 2 Barb. 600.

<sup>4</sup> *Newton Bank v. Hull*, 10 Allen, 145; *Phelps v. Palmer*, 15 Gray, 501. But Mr. Hargrave states that in a Coke upon Littleton in his possession there is a note as follows: "Adjudged by St. John chief justice, and Windham and Archer justices, Hilary 1659, in the common bench, in the cause between Major and the Lord Coventry, that a tenant by elegit may have a writ of partition by the statute of 32 H. 8, and is within the meaning thereof." (*Hargrave's Co. Litt.* 187 a.)

veyance. The grantee of a parcener could not compel a partition. This remark was equally true of all strangers to the blood who had acquired some title or interest under some of the parcnens, although the acquisition was by act of law. Hence, a tenant by the curtesy could not demand partition. But the transfer of the moiety of one parcener, whether by conveyance or by act of law, did not defeat the right of the other parcener to partition. A writ of partition lay against a tenant by the curtesy, and also against an alienee of a coparcener.<sup>1</sup> But if one coparcener purchased the moiety of another, the purchaser, having one moiety by descent and another by purchase, could sustain a writ against the other coparceners. So, if the husband of one parcener purchased the moiety of another, he and his wife could have a joint writ against the others, because he was seized of one part in the right of his wife, who was a parcener.<sup>2</sup>

§ 452. **Mortgagors and Mortgagees.**—A mortgagor continuing in possession, and before the entry of the mortgagee for condition broken, has the right to compel a partition. But the partition is binding only on his interest, and cannot prejudice the mortgagee.<sup>3</sup> On an application for partition, the right of the applicants to the relief sought by them was contested, on the ground that their interests had been conveyed by mortgage. But the Court disposed of this point by saying: “Between the parties to a mortgage and their assigns, the title is in the mortgagee or his assigns; but with respect to strangers to the mortgage, the mortgagee in possession is regarded as the owner of the estate, and so seized of it as to enable him to convey it, or to maintain a real action counting upon his own seizin. Such title was sufficient to prove the issue of seizin, and to entitle the petitioners to a decision of it in their favor.”<sup>4</sup> But if the mortgagee happen to be cotenant of the other moiety, it is said that no action for partition can be sustained against him. “Whether the petition for partition be regarded as a real action, in which

<sup>1</sup> Allnatt on Partition, 54-55; Co. Litt. 174 b, 175 a.

<sup>2</sup> Allnatt on Partition, 55; Co. Litt. 175 a.

<sup>3</sup> 1 Hill. on Morts. 13; Colton v. Smith, 11 Pick. 311; Call v. Barker, 12 Me. 327; Wotten v. Copeland, 7 Johns. Ch. 140.

<sup>4</sup> Upham v. Bradley, 17 Me. 427.

the title is drawn in question, or as a suit for possession, it is an adversary suit, and the mortgagor has both the legal title and the right of possession, as against the mortgagor and those who claim under him. A bill to redeem is the proper remedy, and after redemption a petition for partition may be sustained."<sup>1</sup> In Massachusetts, it was once spoken of as a perfectly clear matter that the execution of a mortgage by one seized of a moiety, gave to the mortgagee a legal seizin and right of possession., by virtue of which he could sustain a suit for partition.<sup>2</sup> At a later date, in the same State, a debtor made three mortgages in severalty to three different creditors. The mortgages embraced the same land, and were simultaneously executed. The mortgagor afterwards surrendered possession, simultaneously, to each of the mortgagees, who entered for foreclosure. One of them then filed a petition against the others for partition. The Court held that although by the simultaneous execution of mortgages a tenancy in common was created between the mortgagees, in which the moiety of each bore the same proportion to the whole that his debt bore to the aggregate debts secured by all the mortgages, yet "that in the present case, the facts of which are peculiar," the petition cannot be sustained. Although the Court declined to commit itself by a final decision upon the rights of mortgagees in general, yet it considered the nature of mortgage estates—showed that such estates were defeasible, and were held as mere securities, and added: "Such being the nature of the right which mortgagees have in mortgaged lands before foreclosure—a defeasible, redeemable, and fluctuating interest—we are of opinion that when such right or interest is held by two or more persons, as joint-tenants or tenants in common, they do not hold such an estate as can be the subject of partition. The statute on this subject of partition does not contain any express limitation, but we think it results from the several provisions taken together, from the obvious purpose of the process of partition, and from the nature of the interest of such mortgagees."<sup>3</sup>

<sup>1</sup> *Bradley v. Fuller*, and *Fuller v. Bradley*, 23 Pick. 8; *Blodgett v. Hildreth*, 8 Allen, 187.

<sup>2</sup> *Rich v. Lord*, 18 Pick. 327. To the same effect is *Munroe v. Walbridge*, 2 Aik. 410.

<sup>3</sup> *Ewer v. Hobbs*, 5 Met. 6.

§ 453. **Holder of Equitable Title.**—As a general rule, an equitable title will not be recognized nor protected outside of a court of equity. Except in the case of a mortgagor, a party seeking to assert rights in a suit at law for a partition must base his claim upon legal title.<sup>1</sup> In Pennsylvania, the rule is different from necessity,<sup>2</sup> for in that State there are no courts of equity, and equitable titles, unless protected at law, would be of no consequence anywhere.

§ 454. **An administrator, though the estate be shown to be insolvent, has no such seizin in the lands of the deceased as entitles him to apply for partition.**<sup>3</sup> The right to partition in such cases is vested in the heirs. This right “is not affected by the circumstance that the administrator, if the estate is insolvent, is entitled to the rents and profits pending the administration; nor that he has the right by license from the Court of Probate to sell the property for the payment of debts, though it could not often be expedient to commence such a proceeding under such circumstances.”<sup>4</sup>

§ 455. **A tenant for life or for years could, both at law and in equity, compel a partition.** He could not compel the reversioner to join with him; nor could he occasion a compulsory partition which would be binding after the termination of his estate.<sup>5</sup> The various American statutes uniformly provide that partition may be made at the application of a cotenant of an estate for life or for years.<sup>6</sup> Partition may be had on the application of a tenant for years, although the tenant of the other moiety holds in fee.<sup>7</sup> A party having a life estate determinable on his marriage, in a moiety of one-fifth, applied in Chancery for partition. The defendants were entitled to the remaining four-fifths as tenants in common in tail, and were together entitled to the reversion of the plain-

<sup>1</sup> *McCabe v. Hunter's Heirs*, 7 Mo. 356; *Hopkins v. Toel's Heirs*, 4 Humph. 46; *Stryker v. Lynch*, 11 N. Y. Leg. Obs. 116; *Coale v. Barney*, 1 G. & J. 341.

<sup>2</sup> *Willing v. Brown*, 7 Serg. & R. 467.

<sup>3</sup> *Nason v. Willard*, 2 Mass. 478.

<sup>4</sup> *Kelly v. Kelly*, 41 N. H. 502.

<sup>5</sup> *Baring v. Nash*, 1 Ves. & B. 551; *Wills v. Slade*, 6 Ves. 498; *Gaskell v. Gaskell*, 6 Sim. 648.

<sup>6</sup> *Ackley v. Dygert*, 33 Barb. 189; *Van Arsdale v. Drake*, 2 Barb. 600.

<sup>7</sup> *Mussey v. Sanborn*, 15 Mass. 155.

tiff's fifth. The defendants all desired that the property should remain undivided. The Master of the Rolls said: "I cannot help regretting that this suit should ever have been instituted. The plaintiff alone, who is tenant for life determinable on his second marriage, desires a partition: all the other parties desire to keep the estate together. If, however, the plaintiff is entitled to the relief he asks, he must have it, however inconvenient it may be to the other owners. As tenant for life, I apprehend there can be no question but that he is entitled to a partition. The question is whether the circumstance of his life estate being determinable on his second marriage makes any difference. As at present advised, I think it does not; but I will further consider it." At a subsequent date, the partition was granted.<sup>1</sup>

§ 456. **Tenants by Curtesy and in Dower.**—A tenant by the curtesy as he has a life estate in the lands of his deceased wife, is, when such lands are held in cotenancy, clearly entitled to a partition thereof.<sup>2</sup> A tenant in dower, because she is not a cotenant, has no right to demand partition of the property to which her dower interest has attached.<sup>3</sup>

§ 457. **Infants.**—Judge Scott of Missouri, supported by a majority of the Supreme Court of that State, denied an application for partition made by an infant acting by his next friend. This denial was based upon the idea that applications for partition made on behalf of infants were generally prosecuted for the purpose of defrauding the applicant, either by procuring an unjust division of the property or a sale thereof for less than its true value. That the partition might be compelled by a proceeding to which the infant should be made a party defendant, did not, in the estimation of the Court, furnish any reason for permitting him to appear as plaintiff, because, "if an evil cannot be entirely checked,

<sup>1</sup> *Hobson v. Sherwood*, 4 Beav. 184.

<sup>2</sup> *Riker v. Darke*, 4 Edw. Ch. 668; *Otley v. McAlpine's Heirs*, 2 Gratt. 343; *Allnatt on Partition*, 59; *Co. Litt.* 175 *a*. In Pennsylvania, at a very early day, the right of a tenant by curtesy to partition was questioned; and the Court had so much doubt on the subject that it prevailed on the parties to compromise, in order that it might avoid the necessity of deciding the question. (*Walker v. Dilworth*, 2 Dallas, 257.)

<sup>3</sup> *Wood v. Clute*, 1 Sanf. Ch. 200; *S. C.* 2 N. Y. Leg. Obs. 407; *Coles v. Coles*, 15 Johns. 320.



that is no reason for multiplying the facilities by which it may be effected.”<sup>1</sup> But the case in which this conclusion was reached was overruled the next year. To the arguments advanced by Judge Scott, the following reply was made: “It is the duty of every minister of the law to watch with jealous care the rights of infants; but human wisdom has not yet succeeded in providing a shield that will protect the weak and innocent against the strong and crafty, and it is not perceived how infants are more exposed to robbery or treachery when they are plaintiffs than when they are defendants. If an infant has no other means of support but an undivided interest in real estate, it is often of great importance to him to have the power of forcing a partition and of securing the separate enjoyment of his share; for whilst it is held in common with an obstinate cotenant, it would not be productive in yielding a ground-rent, nor in any other manner; and to deny him the right to have a partition, would drive him to wait or to an application to the County Court for a sale of his interest, and in that way produce the very result dictated by the cupidity of his tenant in common.”<sup>2</sup> The authorities, except when influenced by prohibitory provisions in statutes of partition, are nearly if not quite unanimous in coinciding with the views last reached by the Supreme Court of Missouri. An infant cotenant may therefore, except where the statute makes special provisions intended for his protection, apply for a partition in the same manner and by the same means that he might institute any other action to enforce his rights in the same property.<sup>3</sup> At Chancery, an infant could file and prosecute a bill for partition. In such case, as the plaintiff was not competent to convey, the Court issued the commission to make the allotments, and decreed that the plaintiff and defendant “be respectively quieted in the possession of the premises severally to be allotted,” and that the conveyances to be made be respited until the infant plaintiff came of age. The infant, being plaintiff, was said to be “as much

<sup>1</sup> *Jonson v. Noble*, 24 Mo. 252; *Davidson v. Bowden*, 5 Sneed, 183.

<sup>2</sup> *Thornton v. Thornton*, 27 Mo. 307; *Larned v. Renshaw*, 37 Mo. 461.

<sup>3</sup> *Postley v. Cain*, 4 Sandf. Ch. 509; *Shull v. Kennon*, 12 Ind. 85; *Clark v. Clark*, 14 Abb. Pr. 299; S. C. 21 How. Pr. 479; *Matter of Marsac*, 15 How. Pr. 383; *Freeman v. Freeman*, S. C. of Tenn., Apr. '72, 2 South. L. R. 168; *Mitchell v. Jones*, 50 Mo. 438; *Goudy v. Shank*, 8 Ohio, 415.



bound and as little privileged as one of full age.”<sup>1</sup> But doubtless an application for partition is not, when made by or on behalf of an infant cotenant, to be granted, as in case of an adult cotenant, as a matter of course. An adult has, when not fettered by special obligations existing independent of the cotenancy, an absolute right to partition; and the Court to which the application is properly presented has no authority to consider whether the further continuance of the cotenancy would prove more or less advantageous than a partition. But the protection of infants is one of the duties with which courts of equity are specially charged. When the Court to which an application for partition is presented on behalf of an infant is a court of equity, or one authorized in matters of partition to exercise a Chancery jurisdiction, it not only may but ought to inquire whether the proposed partition will operate to the prejudice or to the benefit of the infant petitioner; and if, as the result of such inquiry, the conclusion reached is that the partition will not prove beneficial, it ought to be denied. Hence, where the property of the cotenancy consisted of lands, not susceptible of division, underlaid with coal and likely to increase in value; and the lands were less productive at the time than the proceeds of their sale would be, an application made on behalf of the infants was denied, the Court saying: “We cannot perceive that it would be for the interests of the minors to grant the division. A decree in their favor would necessarily result in a sale, for the proof shows that there could be no partition. We cannot consent that this property, now safe from the fluctuations of prices, the accidents of money-lending, and the faithlessness of guardians, shall, without any necessity, be changed into a fund which may take wing and fly away. It might prove a grievous wrong to these children, of which we have no ambition to be guilty.”<sup>2</sup> In New York, a proceeding for partition cannot be instituted on behalf of an infant except by permission of the Supreme Court. Such permission will

<sup>1</sup> *Lord Brook v. Lady Hertford*, 2 P. Wms. 519; *Cannon v. Hemphill*, 7 Tex. 202. For a review of the authorities on the subject of partition by and against infants, see *Croghan v. Livingston*, 17 N. Y. 220.

<sup>2</sup> *Hartmann v. Hartmann*, 59 Ill. 104. See also *Davidson v. Bowden*, 5 Sneed, 129; *Winchester v. Winchester*, 1 Head, 460.

not be given in the absence of satisfactory evidence that a partition or sale is for the best interests of the infant. The proceedings are prosecuted by a competent next friend appointed by the Court, and required to give security.<sup>1</sup>

§ 458. **Married Women.**—If the person desirous of procuring a partition is a married woman, she should join her husband with her in the petition, unless, under the law of the State, she is authorized to sue alone in respect to her separate property. Even if a suit brought by her alone be treated as sufficient to bind her interest, the partition would be imperfect because it could not affect the estate of her husband in the premises.<sup>2</sup> But where a husband and wife are cotenants, it is said that no compulsory partition can be made between them at law, because the proceeding is an adversary one, to which parties, both plaintiff and defendant, are indispensable; and that the wife cannot sue the husband, nor the husband the wife, nor can the two join as petitioners.<sup>3</sup> In equity, however, a married woman may compel her husband to make partition of lands of which they are cotenants.<sup>4</sup>

§ 459. **Two or more cotenants may unite in making** an application for compulsory partition; and those so uniting may elect to consider their several moieties as one moiety, and have it set off to them to hold together undivided.<sup>5</sup> But parties not entitled to demand partition ought not to be

<sup>1</sup> *Lansing v. Guluck*, 26 How. Pr. 252; *Clark v. Clark*, 14 Abb. Pr. 300. For form of petition for leave to bring suit on behalf of an infant, see 2 Van Santvoord's Eq. Pr. 447, 450.

<sup>2</sup> *Spring v. Sandford*, 7 Pai. 555.

<sup>3</sup> *Howe v. Blanden*, 21 Vt. 321. See also *Marston v. Ward*, 35 Tex. 793.

<sup>4</sup> *Moore v. Moore*, 47 N. Y. 468.

<sup>5</sup> *Ladd v. Perley*, 18 N. H. 396; *Upham v. Bradley*, 17 Me. 427; *Choteau v. Paul*, 2 Mo. 263. It is said that one seized of a moiety as tenant in common or joint-tenant cannot join in one writ with a coparcener; that the parcener cannot have the writ by virtue of the statute, because, as she had a remedy at common law, the statute does not apply to her; and that the joint-tenant or tenant in common can only have the writ by virtue of the statute. Hence the parceners must apply alone at common law, or the joint-tenant or tenant in common must apply alone under the statute. (*Allnatt on Partition*, 58.) "The writ is not necessarily confined to mere joint-tenants, or mere tenants in common. It may so happen that several persons may, as to a certain undivided proportion of the estate, be joint-tenants, and as to the residue be tenants in common; yet a writ may be well brought by one or more of them against their companions." (*Ib.* 59, citing *Rider v. Williamson*, And. 42.)

joined with others who are so entitled; nor should any one be made a party defendant who can neither take nor lose anything by the partition.<sup>1</sup> It has sometimes been held that all the cotenants cannot join in demanding a partition. Thus, at an early day in Massachusetts, when all the co-owners joined in the petition, it was denied, because "the applicants, if qualified, in point of age and mental capacity, to maintain this process, are also competent to effect among themselves, and by their own agreements and contracts, every valuable and proper purpose which they can be supposed to have by the partition;" and further, because "the statute plainly implies that this process is only maintainable when the applicant has a share only, and the respondent, or some other person not applying, had an interest, respecting which the partition by this process will be conclusive, to some purposes at least, after due notice. It will be dangerous to give sanction of this kind to an agreement to divide, where all the parties professedly interested are applicants for a partition among themselves."<sup>2</sup> Judge Scott, in pronouncing the opinion of the Supreme Court of Missouri, said: "The statute contemplates that in suits for partition there should be a plaintiff and a defendant. In all suits at common law, there must be an *actor* and a *reus*. If parties come in voluntary and ask a Court to make a partition among them, and it is done, they will stand afterwards just as they did before the Court interfered, so far as judicial sanction is concerned."<sup>3</sup> The views here expressed by Judge Scott were soon afterwards repudiated in the same Court, on the ground that proceedings for partition were, in that State, statutory and in many respects *sui generis*; that the practice of uniting as petitioners all the parties in interest had long been followed, and that great injustice would inevitably result from ignoring titles based on this practice; and further, that the statute clearly contemplated the union of all the cotenants as petitioners whenever they saw proper so to unite.<sup>4</sup> The rule that the misjoinder of parties plaintiff is fatal to the maintenance

<sup>1</sup> *Mark v. Mark*, 9 Watts. 411; *Power v. Power*, 7 Watts. 205.

<sup>2</sup> *Swett v. Bussey*, 7 Mass. 504.

<sup>3</sup> *Bompart v. Roderman*, 24 Mo. 399.

<sup>4</sup> *Wagh v. Blumenthal*, 28 Mo. 464; *Larned v. Renshaw*, 37 Mo. 462.

of an action has been thought to be applicable to writs for partition. Thus Kennedy, Justice, pronouncing the opinion of the Supreme Court of Pennsylvania, said: "No good reason can be shown, I apprehend, for exempting an action for partition from this rule. It being a real action in its nature, and particularly, from the nature of the general issue that is appropriate to it, if there be any difference between it and mere personal actions of *tort*, it is that the rule seems to be applicable to it, when too many persons are made co-defendants as well as where too many join in becoming co-plaintiffs."<sup>1</sup>

§ 460. **Rights acquired after filing Partition.**—It is material that the applicant should be entitled to partition at the time when his demand for it was made. If a reversioner file a bill for partition, it must be dismissed notwithstanding the fact that before the hearing he purchased the life estate, and thereby acquired an interest entitling him to partition.<sup>2</sup> A like result must follow where the reversioner, subsequently to filing his petition, becomes entitled to the possession through the termination of the particular estate;<sup>3</sup> and also where the petitioner held a defeasible estate, which, through lapse of time, became indefeasible before his petition was heard.<sup>4</sup> In Vermont, a petition, filed before the applicant's right became perfect, was sustained, process not being served until his title had become absolute.<sup>5</sup>

§ 461. **Cotenant by Disseizin or Tax Title.**—That the applicant procured the title to his moiety by disseizin or by tax sale is no answer to his petition for partition. If he has become a cotenant, and is of right and in fact in possession of the property to be divided, the manner of his acquisition is immaterial. But he must show clearly that he is a cotenant, and must negative every fact the existence of which would defeat his title. He must therefore prove that the person to whose title he claims to have succeeded by disseizin or

<sup>1</sup> Lockhart v. Power, 2 Watts, 372.

<sup>2</sup> Evans v. Bagshaw, L. R. 5 Ch. 340; Attorney-General v. Avon, 11 W. R. 1050.

<sup>3</sup> Hunnewell v. Taylor, 6 Cush. 476.

<sup>4</sup> Phelps v. Palmer, 15 Gray, 501.

<sup>5</sup> Hawley v. Soper, 18 Vt. 322.

through a tax sale was free from disability, for otherwise the tax sale might still be defeated by a redemption or the title by disseizin avoided by suit within a proper time after the removal of the disability.<sup>1</sup>

<sup>1</sup> *Ross v. Cobb*, 48 Ill. 111.

Note containing a synopsis of the statutes of the several States, showing what may be partitioned, and who may apply therefor.

**ALABAMA.**—"Any property—real, personal, or mixed—held by joint owners or tenants in common, may be divided among them on the application of the persons entitled thereto, or any one of them, in writing, to the Judge of Probate of the county in which the property is. Such application may be made by the executor or administrator of a deceased person in interest, or by a guardian of a minor or person of unsound mind."—Code of Ala., ed. 1867, sec. 3105.

**ARKANSAS.**—"When any lands, tenements, or hereditaments shall be held in joint-tenancy, tenancy in common, or coparcenary, whether such right or title be devised by purchase, devise, or descent, or whether any, all, or a part of such claimants be of full age or minors, it shall be lawful for any one or more of the persons interested, by themselves if of full age, or by their guardians, if minors, to present their petition praying for a partition," etc.—Gould's St. of Ark., ed. 1858, p. 811, sec. 1. Sec. 32, same statute, provides for partition when some of the cotenants have estates for life or years, and others have estates in fee. Guardians of minors or of persons of unsound mind are authorized, "in behalf of their respective wards, to do and perform any matter or thing respecting the division of lands or tenements, as herein directed, which shall be binding on such ward."—Ib., p. 815, sec. 34.

**CALIFORNIA.**—"When several cotenants hold and are in possession of real property as parceners, joint-tenants, or tenants in common, in which one or more of them have an estate of inheritance, or for life or lives, or for years, an action may be brought by one or more of such persons for a partition thereof."—Code C. P., sec. 752.

**CONNECTICUT.**—On petition of any person interested, a partition may be ordered of any real estate, held in joint-tenancy, tenancy in common, or coparcenary; also of any real estate held by tenants in tail.—Rev. of 1866, p. 398, sec. 38.

**DELAWARE.**—"Writs for the partition of real estate, held in joint-tenancy, or tenancy in common, may be issued by the Superior Court."—Rev. St., ed. 1874, p. 527, sec. 8. "When any two or more persons hold as joint-tenants or tenants in common, lands or tenements within this State, any one or more of them, being of lawful age, or the guardian of any being under age, may prefer a petition to the Chancellor," etc.—Ib., p. 528, sec. 8.

**FLORIDA.**—The bill or petition may be filed by any one or more of several joint-tenants, tenants in common or coparceners.—Bush's Digest, p. 616, sec. 2. The statute also provides for the partition of personal property.—Ib., p. 620, sec. 13.

**GEORGIA.**—Application for partition may be made in all cases where two or more are common owners of lands and tenements.—Code of Geo., ed. 1873, sec. 3996. "If the party desiring the writ of partition be of full age, and free from disability, he may make the application either in person or by his agent or attorney in fact, or at law, and if the application is for the benefit of a minor, a lunatic, *feme covert*, or *cestui que trust*, it may be made by the guardian of such minor, or lunatic, by the husband of such *feme covert*, or the trustee of such *cestui que trust*."—Ib., sec. 3997. Personal property may be partitioned in the same manner as real estate.—Ib., sec. 4008.

**ILLINOIS.**—The part of the statute of this State which designates what property may be partitioned and who may apply for partition, is substantially like sec. 1 of the statute of Arkansas. (See Gross' St., p. 469, sec. 1.)

**INDIANA.**—"All persons holding lands as joint-tenants, tenants in common, or tenants in coparcenary, may be compelled to divide the same."—Rev. St., ed. 1852, p. 329, sec. 1. The application may be made by any such tenant.—Ib., sec. 2.

**IOWA.**—The Code provides that partition shall be by equitable proceedings, and makes no other designation as to who may have partition, nor of what it may be had. (See sec. 3277 of Code of 1873.)

**KANSAS.**—Nothing said in the statute in reference to who may apply. (See Genl. St., ed. 1868, p. 753.)

**KENTUCKY.**—"Lands held by joint-tenants, tenants in common, coparceners or devisees, may be divided," etc. "The party desiring such partition may apply," etc.—Stanton's Rev. St., vol. 2, p. 100, secs. 1, 2.

**MAINE.**—"Persons seized, or having a right of entry into real estate in fee-simple or for life, as tenants in common, joint-tenants, or copartners, may be compelled to divide the same." "Persons so entitled, and those in possession or having a right of entry for a term of years, as tenants in common, may present a petition," etc.—Rev. St. of Me., ed. 1871, p. 694, secs. 1, 2.

**MARYLAND.**—Partition may be decreed of any lands, or tenements, or any right, interest, or estate therein, legal or equitable, on the bill or petition of any joint-tenant, tenant in common or parcener, or of any concurrent owner, whether claiming by descent or purchase. The application, if on behalf of an infant, may be made by his guardian or *prochein ami*, and if on behalf of a lunatic, may be by his committee or trustee.—Public Genl. Laws, ed. 1860, p. 91, sec. 99.

**MASSACHUSETTS.**—"Persons holding land as joint-tenants, coparceners, or tenants in common, may be compelled to divide the same." "One or more of the persons so holding may apply."—Genl. St., ed. 1860, p. 698, secs. 1, 2. The applicant must have an estate in possession—(Ib., p. 699, sec. 3)—but partition may be made notwithstanding a lease of the whole or of part.—Ib., p. 705, sec. 67. No tenant for less than twenty years can have partition against a tenant of the freehold.—Ib., p. 699, sec. 4. Tenants for years may have partition among one another, not to affect their landlords or reversioners.—Ib., sec. 5. The statute also provides for the partition of water rights.—Ib., p. 706, sec. 77.

**MICHIGAN.**—"All persons holding lands as joint-tenants, or tenants in common, may have partition thereof." "Any one or more of the persons so holding may institute a suit." Such suit cannot be sustained by one having an estate in reversion or remainder.—Comp. Laws, ed. 1871, sec. 6266-6268.

**MINNESOTA.**—"When two or more persons are interested in real property as joint-tenants, or as tenants in common, in which one or more of them have an estate of inheritance or for life or years, an action may be brought by one of such persons against the others for a partition thereof."—Bissell's St., ed. 1873, p. 888, sec. 34.

**MISSISSIPPI.**—"All persons who are joint-tenants, tenants in common, or coparceners, having estates in land in this State, in possession, or having the mere right of possession, whether the joint interest in such lands be in fee-simple or for a term not less than five years, shall be entitled to partition of such lands. But those who hold in reversion or remainder shall not be entitled to this remedy."—Rev. Code, ed. 1871, sec. 1809. "Any one or more of the parties interested, whether suing in their own right or as executors or guardians, may institute proceedings for partition."—Ib., sec. 1814.

**MISSOURI.**—"In all cases where lands, tenements or hereditaments, are held in joint-tenancy, tenancy in common, or coparcenary, including estates in fee, for life, or for years, tenancy by the courtesy and in dower, it shall be lawful for one or more of the parties interested therein, whether adults or minors, to file a petition, asking for the admeasurement and setting off of any dower interest therein, if any, and for the partition of the remainder."—Rev. St., ed. 1865, p. 611, sec. 1.

**NEBRASKA.**—"All tenants in common or joint-tenants of any estate in land may be compelled to make or suffer partition of such estate or estates."—Code C. P., sec. 802.

**NEVADA.**—The statute of this State is substantially like that of California. (See Comp. Laws, ed. 1873, sec. 1327.)

**NEW JERSEY.**—"Any person, being a coparcener, joint-tenant, or tenant in common, in any tract or tracts of land within this State may apply to any Justice of the Supreme Court, etc., for a partition of such tract or tracts."—Nixon's Dig., 4th ed. p. 666, sec. 1. In addition to this statute, another is in force like that of 3 and 4 Wm. IV.—Ib., p. 677, sec. 1 to 8. Also another statute providing that "partition of lands, held by coparceners, joint-tenants or tenants in common may be made, notwithstanding the share held by any coparcener, joint-tenant, or tenant in common, may be for a less estate than a fee, or may be limited over after an estate for life, or any estate therein; and such partition shall bind all tenants of such share, in remainder, reversion, or expectancy, who shall be entitled only to that part of the lands partitioned as may be set off in severalty to the share upon which such remainder or expectancy is limited."—Ib., p. 673, sec. 53.

**NEW HAMPSHIRE.**—"One or more persons, having or holding real estate with others, in possession, reversion, or remainder, after an estate of freehold, if such remainder is vested and not contingent, may have partition thereof."—Genl. St., ed. 1867, p. 463, sec. 1.

**NEW YORK.**—The statute is similar to that of California, except that the applicant must be of full age.—3 Rev. St., 5th ed. p. 603, sec. 1. The Supreme Court may also authorize proceedings for partition to be commenced on behalf of an infant.—Ib., p. 604, secs. 5, 6.

**NORTH CAROLINA.**—Partition may be made "on the petition of one or more persons claiming any real estate as tenants in common."—Code of N. C., ed. 1855, p. 452, sec. 1. The same right is given to cotenants of personal property.—Ib., p. 457, sec. 17

**OHIO.**—"All joint-tenants, tenants in common, and coparceners of any estate in lands and tenements and hereditaments within this State, may be compelled to make or suffer partition of such estate or estates."—Swan's Rev. St., ed. 1854, p. 590, sec. 1.

**OREGON.**—The statute is like that of California and New York.—Deady's Genl. Laws, ed. 1864, p. 255, sec. 419.

**PENNSYLVANIA.**—Partition may be made "at the suit of any tenant in common, joint-tenant, or copartner."—2 Brightly's Purdon's Digest, p. 1112, secs. 1, 5.

**RHODE ISLAND.**—Every joint-tenant, tenant in common, or coparcener, seized or possessed of any estate of inheritance, or for life or years, in any lands, tenements, or hereditaments, in their own right or the right of their wives, may compel partition. Such partition continues only until the estate of some of the parties determines, except when the tenant in reversion or remainder joins with the tenant for life or years in demanding partition, when the partition shall be of the whole estate.—Genl. St., ed. 1872, p. 519, secs. 1 to 5.



**SOUTH CAROLINA.**—Partition may be made upon the petition of any person or persons interested in any real estate as joint-tenants or tenants in common of an estate of inheritance, or for life or lives or years.—Rev. St., ed. 1873, pp. 530-1, secs. 1, 4.

**TENNESSEE.**—“Any person having an estate of inheritance, or for life or for years, in lands, and holding and being in possession thereof as tenant in common or otherwise, with others, is entitled to a partition thereof.”—St. of Tenn., ed. 1871, sec. 3262.

**TEXAS.**—“All part owners of any estates of inheritance in lands, tenements, and hereditaments, in their own rights, or in the rights of other persons, and all part owners who hold, for a term of life or years, with others who may have estates of inheritance, or freehold in any lands, tenements, or hereditaments, may be compelled to make partition between them, of such lands, tenements, and hereditaments as they may hold as part owners; but no such partition between a part owner, or owners, who hold estates for term of life or years, with others who hold equal or greater estates, shall be prejudicial to those entitled to the reversions, or remainders, after the death of the owners for life, or after the expiration of the years.”—Pascal's Digest, Art. 4707. “Part owners of slaves and other personal property may be compelled to make partition between them.”—Ib., Art. 4711.

**VERMONT.**—“Any person, having or holding real estate with others, as joint-tenants, tenants in common, or coparceners, may have partition thereof in the manner hereinafter provided. Such person may apply to the County Court, \* \* \* praying for a partition.”—Genl. St., Vt., p. 353, secs. 1, 2.

**VIRGINIA.**—“Tenants in common, joint-tenants, and coparceners, shall be compellable to make partition.”—Code of Va., p. 920, sec. 1.

**WEST VIRGINIA.**—Same as Virginia.—Code of West Va., p. 486, sec. 1.

**WISCONSIN.**—“All persons holding lands as joint-tenants, or tenants in coparcenary or common, may have partition thereof.”—2 Taylor's St. of Wis., p. 1678, sec. 1. “Any one or more of the persons so holding lands may institute an action.”—Ib., sec. 2. “Such action may be maintained by any person who has an estate in possession in the lands of which partition is sought, but not by any one who has only an estate therein in remainder or reversion.”—Ib., p. 1679, sec. 3.



## CHAPTER XXII.

### OF PARTIES DEFENDANT, AND THE PERSONS BOUND BY PARTITION.

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§ 462. **Division of the Subject.**—If it be ascertained that the property sought to be divided is a proper subject for a compulsory partition, and that the person desirous of procuring a partition is, under the law, competent to institute proceedings therefor, the next question to be considered is, who are proper and necessary parties defendant; who must be brought before the Court to enable the petitioner to procure the most perfect and absolute title to the purparty to be assigned to him, which it is possible for him to acquire by a compulsory partition; or to enable the purchaser, in case a

sale of the property is ordered, to obtain a title so satisfactory that no reasonable objections can be urged against it. In treating of parties defendant, we shall speak, first, of the cotenants themselves; second, of persons who though not cotenants at the institution of the proceedings, have rights and interests attached to some part of the property of the cotenancy, such as lienholders and tenants in dower; third, of persons not in being at the filing of the petition, but who on coming *in esse* may be entitled to some interest in the property; and fourth, of persons having an interest in the property as tenants of moieties or in severalty, and proceeded against as unknown owners.

§ 463. **All the Cotenants must be Parties.**—It is a general principle of law that a litigation can never result in an adjudication which will be binding upon others than the parties to the suit, and their privies in blood or in estate. To this general rule proceedings *in rem* form no exception, for in those proceedings the subject of the litigation is itself a party, and being itself bound by the result, all interests in it must be likewise bound. A suit for partition is sometimes spoken of as a proceeding *in rem*; but ordinarily it is not such a proceeding, for the process is not served upon the land, nor is the land a party defendant, nor is the final judgment binding on any of the cotenants who were not brought within the jurisdiction of the Court by some service of process, actual or constructive. It is therefore indispensable that *all the cotenants* not uniting in the petition be made parties defendant.<sup>1</sup> In treating of parties in Chancery, in the case of *Barney v. Baltimore City*,<sup>2</sup> Mr. Justice Miller divides them into three classes: 1st, those who have such a relation to the suit, formal or otherwise, that while they may be called proper parties, the Court will take no notice of their omission; 2d, those whose interests are such that the Court

<sup>1</sup> *Burhans v. Burhans*, 2 Barb. Ch. 407; *Kester v. Stark*, 19 Ill. 329; *Brashear v. Macey*, 3 J. J. Marsh. 93; *Borah v. Archer*, 7 Dana, 177; *Batterton v. Chiles*, 12 B. Monr. 854; *Harlan v. Stout*, 22 Ind. 488; *Lancaster v. Seay*, 6 Rich. Eq. 111. "Where a bill is brought for a partition either by tenants in common or joint-tenants all persons required to join in the conveyances must be made parties to the suit." *Calvert on Parties*, 259, citing *Anon.* 1 Swan. 139.

<sup>2</sup> 6 Wall. 284.

will order them to be made parties, if within its jurisdiction, but otherwise will administer such relief as it can without them; 3d, those “whose interests in the subject-matter of the suit, and the relief sought, are so bound up with that of the other parties, that their legal presence as parties to the proceeding is an absolute necessity, without which the Court cannot proceed. In such cases, the Court refuses to entertain the suit, when these parties cannot be subjected to its jurisdiction.” He then proceeded to quote and approve the following description of this third class as given in *Shiels v. Barrow*:<sup>1</sup> They are “persons who not only have an interest in the controversy but an interest of such a nature that a final decree cannot be made without either affecting that interest or leaving the controversy in such a condition that its final determination may be wholly inconsistent with equity and good conscience.” He next stated that this description applied to all cotenants where the suit was for partition, saying: “If a decree is made which is intended to bind them, it is manifestly unjust to do this when they are not parties to the suit, and have no opportunity to be heard. But as the decree cannot bind them, the Court cannot, for that very reason, afford the relief asked to the other parties. If, for instance, the decree should partition the land and state an account, the particular pieces of land allotted to the parties before the Court would still be undivided as to *these* parties, whose interest in each piece would remain as before the partition. And they could at any time apply to the proper Court, and ask a repartition of the whole tract, unaffected by the decree in this case, because they can be bound by no decree to which they are not parties.” While the rule seems to be invariable that Courts will not proceed to a partition in the absence of any of the cotenants, yet it must be remembered that this rule is confined to cotenants of the estate of which partition is sought. Hence, a partition may be ordered of an estate for years, or for life, or of a mere equity, although the tenants of the reversion or of the legal title are not before the Court. In such case, while the absent parties are not bound, yet the partition made is, to the extent of the interests

<sup>1</sup> 17 How. U. S. 130.

with which it assumes to deal, perfect and conclusive.<sup>1</sup> But by proceeding in equity, the holders of the equitable title may make the holders of the legal title parties, and may thus obtain complete title both at law and in equity to their respective purparties. It has also been held that unless some special reason for their omission can be shown, the Court ought not to proceed in the absence of the cotenants of the legal title. In a case in Kentucky where the holders of the legal title were made defendants, but no decree was entered against them, and the failure to decree a conveyance from them was assigned as error, the Court of Appeals, by Chief Justice Marshall, said: "In a case where, owing to peculiar circumstances, the legal title could not be at once conveyed, the Court might doubtless make partition, give possession, and secure the enjoyment accordingly, until effectual conveyances could be made. But where there is no obstacle to decreeing the title at once, or where the obstacle is such that its removal may affect the partition itself, the general practice of the Court, and the principle and object of its jurisdiction, require such proceedings, that the whole matter should be settled and the partition effectuated by a conveyance of the title according to the equities of the parties. Otherwise, one or more new contests may spring up in the attempt to procure the legal title."<sup>2</sup>

§ 464. **Cotenant Dying, his Heirs must be made Parties.**—It is essential that the persons whose interests are sought to be affected be parties to the suit at the time the judgment or decree disposing of their interest is made, except where a transfer has been made *pendente lite* under such circumstances that the title of the assignee is held by him subject to the result of the litigation. If pending a partition suit between cotenants who do not hold with benefit of survivorship, one of them die, the action thereby becomes defective, and cannot properly proceed until the successors in interest of the deceased are brought before the Court. By his death his heirs have become cotenants in his stead, and

<sup>1</sup> Story's Eq. Jur. sec. 656. In a suit between tenants in common, for partition of an estate or interest carved out of the fee, the owner of the fee, who is the common source of title, is not a necessary party. *Canfield v. Ford*, 28 Barb. 342.

<sup>2</sup> *Hunter v. Brown*, 7 B. Monr. 284.

their rights as such cannot be litigated in their absence. In New York, a bill for partition was filed, and was taken as confessed against all the defendants. One of them died before any further proceedings were taken. The suit proceeded without any revivor against his heirs, resulting in a sale of the premises. The heirs of the deceased cotenant brought an action of ejectment against the purchaser at the partition sale. In this suit they prevailed, on the ground that the partition proceedings were, as against them, absolutely void.<sup>1</sup> So in California where, in a suit for divorce, a supplemental decree had been made, subsequently to the death of the husband, disposing of the community property, the Supreme Court, in another action in which the effect of the decree was questioned, said: "The supplemental decree in the divorce suit, under which the plaintiff claims to be the owner of the whole land sued for, was, in our judgment, null and void as against the heirs at law of Harman. By the death of Harman, the suit abated for all the purposes of judicial action therein on the subject of partitioning the common property, and the Court had no jurisdiction to adjudge that the property should be sold and the proceeds divided without a revivor as to the heirs. No such revivor was had, and the interests of the heirs were therefore unaffected by the supplemental decree, and the transactions under it."<sup>2</sup> But we apprehend that the decisions holding as void in all cases decrees of partition rendered against parties who were duly served with process, and thereafter and before judgment died, will not be received with universal concurrence, especially where an inspection of the whole record in the partition suit would have no tendency to put the purchaser upon his guard. Many of the authorities in reference to judgments against deceased parties hold that the service of process gives Courts jurisdiction which they may exercise to final judgment; that on the death of a party, Courts ought to pause until his successor in interest can be brought in, but that if they do not so pause, their action, though erroneous, is not void.

<sup>1</sup> *Requa v. Holmes*, 16 N. Y. 198; *Requa v. Holmes*, 26 N. Y. 347.

<sup>2</sup> *Ewald v. Corbett*, 32 Cal. 499.

<sup>3</sup> *Freeman on Judgments*, secs. 140, 153.

§ 465. **Grantee of Part.**—We have in a previous part of this work treated of the effect of conveyances made by one of the cotenants, assuming to convey by metes and bounds his interest in some portion of the lands of the cotenancy; and have there shown that, according to some of the authorities, such a conveyance may be disregarded for all purposes by all the cotenants of the grantor; while, according to other authorities, the conveyance makes the grantee a tenant in common of the tract so conveyed, and is valid and binding, except that it can in no respect prejudice the rights of the cotenants of the whole tract to a compulsory partition thereof.<sup>1</sup> In those States where such a conveyance is regarded as void against the cotenants of the grantor, the grantee is not usually considered as a necessary party defendant to a suit for partition; and such suit may be prosecuted to a final decree without taking any notice of him whatsoever.<sup>2</sup> But there can be no doubt that the grantee of a specified parcel will become seized thereof in severalty if, upon partition, it should be assigned to him or to his grantor;<sup>3</sup> and that if not so assigned, he will lose his entire interest.<sup>4</sup> He is more deeply interested in the partition than are any of the tenants in common of the entire tract. It matters little to them where their respective purparties may be located. But with the grantee of a special location, it is all-important that such a division may be made as will allow his deed to become operative. He is entitled to the consideration of the Court, and will, whenever his claims are known to the Court, be protected, as far as possible, without doing injustice to the cotenants of the whole tract. He has therefore been regarded as a proper party defendant even in States where his conveyance has been spoken of as void against the cotenant of his grantor.<sup>5</sup> In such States the making of such a grantee a party defendant may, perhaps, be required by the Courts rather by reason of their desire to do complete justice, than as a matter of absolute right; but in

<sup>1</sup> See secs. 195 to 206.

<sup>2</sup> *Jackson v. Meyers*, 14 Johns. 354; *Blossom v. Brightman*, 21 Pick. 284 and 285; *Broughton v. Howe*, 6 Vt. 267.

<sup>3</sup> See sec. 207.

<sup>4</sup> *Cooper v. Fisher*, 10 L. J. R. (N. S.) Ch. 221.

<sup>5</sup> *Whitton v. Whitton*, 38 N. H. 133; *Harlan v. Langham*, 69 Pa. St. 237.

States where his conveyance is regarded as valid and as investing him with all the rights and interests which his grantor had in the tract conveyed, his right to be a party defendant is as absolute as that of a cotenant of the whole tract.<sup>1</sup> In Ohio, the extreme, and we think untenable, position has been taken, that where there are several grantees of different special locations, they cannot be united as parties defendant to a suit for partition brought by one holding a moiety of the whole tract.<sup>2</sup> The most that has elsewhere been claimed in behalf of such grantees, is that they acquire the rights of their grantor so far only as such rights may be transferred without prejudicing the rights of the cotenants of the grantor to partition. The effect of this Ohio decision would be to permit each cotenant to break the cotenancy into fragments, and to require a separate suit for every fragment. This, we feel confident, will not be tolerated in any other State.

§ 466. **Femes Covert.**—When one of the cotenants is a married woman, she is as necessary a party defendant as if she were a *feme sole*. Many of the statutes in regard to partition provide the means and mode by which she must be brought into Court. When the statute fails to regulate this subject, we apprehend that she must be made a party and served with process as in other civil cases affecting her separate estate. A majority of the authorities sustains the view that a judgment against a married woman is as impregnable against a collateral assault as if it were against a *feme sole*, and that a judgment rendered on a cause of action to which the fact of her coverture would have been a sufficient defense is nevertheless valid until set aside by some appropriate motion, or reversed upon appeal.<sup>3</sup> But coverture never afforded any defense to a suit for partition. It was always competent for Courts having jurisdiction of the subject of partition to dispose of the moieties of *femes covert*. We know of no reason why a judgment or decree in partition should be any less binding on a married woman than on any other party to the

<sup>1</sup> *Gates v. Salmon*, 35 Cal. 588; *Sutter v. San Francisco*, 36 Cal. 115.

<sup>2</sup> *Ebenezer Prentiss' Case*, 7 Ohio, Part 2, p. 132; *Harman v. Kelley*, 14 Ohio. 506.

<sup>3</sup> *Freeman on Judgments*, sec. 150.



suit.<sup>1</sup> There are, it is true, instances in which married women have been able to escape from what might, at first glance, seem to be the necessary consequence of a partition. But it is well settled that a person litigating in one capacity can neither be himself bound nor bind others when subsequently litigating in another capacity;<sup>2</sup> and also that a former adjudication is not conclusive upon issues not involved within it. All the cases where *femes covert* have been able, to any extent, to avoid a compulsory partition to which they were parties, are justified by one or the other of these principles, if they can be justified at all. One J. W., being a married man, was seized of certain real estate, upon which an execution was levied. Under this execution, a sale and conveyance were made by the sheriff; and the title thereby transferred subsequently vested in J. H., the father-in-law of J. W. At the death of J. H., he devised this real estate to Mrs. J. W. and her sister as tenants in common. An action for partition was afterwards prosecuted between the devisees, in which no mention was made of Mrs. J. W.'s inchoate right of dower. After the partition was completed, J. W. died, and his wife filed her petition for the assignment of her dower. In stating its reasons for sustaining this petition, the Court said: "The plaintiff's claim is not barred by the proceeding in partition regarded as an adjudication. It is not *res judicata*. That proceeding was, throughout, silent in respect to the plaintiff's inchoate right of dower, and very properly so; for she then had not only no estate, but no right capable of being asserted in action. What she had was a mere possibility, which might or might not subsequently ripen into something of value."<sup>3</sup> In Missouri, A. C. and wife were tenants by entireties of a parcel of real estate. After the death of A. C., his wife again married. The administrator of A. C.'s estate brought suit against the wife and her second husband for the purpose of procuring an assignment of her dower, and of having the residue of the land sold for the purposes of partition. The petition contained the usual and ordinary aver-

<sup>1</sup> Doe on demise of Short v. Prettyman, 1 Hous. Del. 334; Disbrow v. Folger, 5 Abb. Pr. 54; Pillsbury v. Dugan's Admr. 9 Ohio. 120.

<sup>2</sup> Freeman on Judgments, sec. 156.

<sup>3</sup> Walker v. Hall, 15 Ohio St. 360.



ments of a petition for partition and to set aside dower. The wife was ignorant of her rights as survivor of the tenancy by entireties, and therefore made no objection to the proceedings instituted by the administrator. A decree was entered assigning her part of the land as dower, and directing the balance to be sold. At the sale, the land was purchased by persons interested as heirs of the deceased and conversant with all the facts of the case, and who were not misled by any act or representation of the wife. Eight years afterwards, the wife becoming informed of her rights, filed her petition praying that the former proceedings might be set aside. The Supreme Court was of the opinion "that under the circumstances of the case, there was certainly no rule of law which would prohibit her from maintaining her suit for the assertion of her rights."<sup>1</sup> Considerable stress was placed upon the fact that the sale was made to persons fully acquainted with all the circumstances, and who were parties in interest. The grounds upon which the plaintiff was deemed entitled to relief were not clearly stated by the Court. It is probable, however, that the Court proceeded upon the theory suggested by the wife's counsel, that she "having acted by mistake and in ignorance of her rights, and no third parties intervening, a court of equity will grant relief." In Kentucky, when the lands of a married woman are about to be sold in order to make a partition, the Court must require her share of the proceeds to be secured to her by a bond, unless she, "being over the age of twenty-one years, and upon privy examination before the Judge, or a commissioner by him appointed, requests that no order for such bond be made. In one case, a sale was made without requiring any bond, and without the wife consenting, on such examination as the statute designated, to waive such bond. She did not object to the sale, nor make any motion to have it set aside. The purchaser, however, refused to comply with his bid, and was sustained in his refusal, on the ground that "these proceedings, as to the sale, not conforming either to the Revised Statutes or Civil Code, were invalid and the sale unauthorized, and no valid title could, by virtue thereof, be secured the purchaser."<sup>2</sup>

<sup>1</sup> *Crenshaw v. Creek*, 52 Mo. 100; *Thompson v. Renoe*, 12 Mo. 157.

<sup>2</sup> *Horsfall v. Ford*, 5 Bush. 644.

§ 467. **Infants.**—By the common law, an infant could be compelled to make partition. In this respect, he could never avail himself of his disability. The fact of his nonage was at no time regarded as a sufficient reason for denying his cotenants their right to have a partition.<sup>1</sup> The judgment rendered upon such writ was not less binding on the infants than on the adults.<sup>2</sup> In equity, as the partition was not consummated until conveyances were executed by the parties in pursuance of the decree of the Court, an infant could not be compelled to make partition, because he was incapable of executing a conveyance. But this apparent difficulty was so nearly avoided as to be of little consequence. The infant was subject to the jurisdiction of the Court. He could be made a party defendant. In partition cases, infant cotenants were brought before the Court; the allotments were made as in other cases; a decree was entered quieting the enjoyment of the respective purparties to the persons to whom they had been allotted; and the making of the conveyance was respited until the infant attained his majority, or until the further order of the Court. In analogy to the practice in other cases, the infant was allowed a day after coming of age to show cause against the decree.<sup>3</sup> But by statute 13 and 14 Vict., ch. 60, sec. 30, an infant no longer has his day in court, after coming of age, to show cause against the decree; but is declared to be a trustee of such portions as are awarded to the other cotenants.<sup>4</sup> In America, the rule of the common law that infancy does not suspend the right of the adult cotenants to enforce a partition is believed to be of universal obligation.<sup>5</sup> This rule has been held to be applicable to a sale of the property, when a division was impracticable. The right of the adults “to have the possession of their property, and to have their wishes in the premises gratified, is to be respected equally with the interests of the infants. It would be monstrous to hold, that adult part owners should be kept out of the enjoyment of their property merely because the

<sup>1</sup> Co. Litt. 171 a; Allnatt on Partition, 27.

<sup>2</sup> Allnatt, 64, 80.

<sup>3</sup> Allnatt, 104; Story's Eq. sec. 652.

<sup>4</sup> Bowra v. Wright, 4 De G. and S. 265; S. C. 20 L. J. (N. S.) Ch. 216; S. C. 3 Eng. L. & E. 190.

<sup>5</sup> Hooke v. Hooke, 6 Lou. 474.

other part owners were infants, and the interests of such infants did not require the property to be sold."<sup>1</sup> The means of bringing infant cotenants before the Court in order to bind their interest in a suit against them for partition has been made the subject of special statutory regulation in most of the States. Unless the infant voluntarily appears in some manner authorized by law, or is served with process in substantial conformity with the provisions of the statute, the partition is not binding upon him.<sup>2</sup> But if he be brought within the jurisdiction of the Court, the partition is as effectual against him as against an adult,<sup>3</sup> and cannot be avoided for irregularities or errors in the subsequent proceedings.<sup>4</sup>

§ 468. **Granting Infants a New Partition.**—While infants, in partition suits as in other legal proceedings, are not exempt from the jurisdiction of the Courts, and may be required to appear in court for the purpose of representing and protecting their interests, yet the law is not designed for the purpose of allowing dishonest persons to take advantage of the incompetency of infancy. And wherever, through the collusion of the adult cotenant with the guardian or other person to whom the duty of caring for the infant's interest has been assigned, an unequal partition has been made, courts of equity are ready to interfere in the infant's behalf, and, by ordering a new partition, to restore him to the condition in which he was before his interests were imperiled by collusion and treachery.<sup>5</sup>

§ 469. **Lunatics.**—The authorities in regard to the partition of property, one of the cotenants of which is a lunatic, are exceedingly meagre. This much, however, is certain: that the lunatic, notwithstanding the appointment of a guardian or committee, is still vested with the title to his property, and that the legal title thereto cannot be affected

<sup>1</sup> *Coker v. Pitts*, 37 Ala. 693.

<sup>2</sup> *Shaw v. Gregoire*, 41 Mo. 413; *Fiske v. Kellogg*, 3 Oregon, 503; *Hickenbotham v. Blacklege*, 54 Ill. 316; *Savage v. Williams*, 15 La. An. 250.

<sup>3</sup> *Hite v. Thompson*, 18 Mo. 461; *Richards v. Richards*, 17 Ind. 636; *Althause v. Radde*, 3 Bosw. 410.

<sup>4</sup> *Castleman v. Perry*, 50 Mo. 583; *Shaw v. Gregoire*, 35 Mo. 346; *Fulbright v. Cannelfox*, 30 Mo. 425.

<sup>5</sup> *Merritt v. Shaw*, 15 Grant's Ch. 323; *Long v. Mulford*, 17 Ohio St. 484.

by any suit to which the lunatic is not a party.<sup>1</sup> He must, therefore, be made a defendant in partition. "It is very certain that a coparcener, joint-tenant, or tenant in common, is entitled to partition, and to have his share allotted to him in severalty, although his cotenant be a lunatic; and the jurisdiction of the Judge does not depend on the character of the cotenants, but on the fact that the land is held jointly by parceners, joint-tenants, or tenants in common, and that some of them, able to sue, make application for partition in the manner prescribed by the act."<sup>2</sup> Where a bill for partition was filed against a person of weak intellect who answered by her guardian, the Court made the usual order for a commission, and that the lands should be held in severalty; but it seemed to be conceded by complainant's counsel that no conveyance could be made by defendant owing to her mental incapacity. The decree was therefore made subject to further directions, and without ordering a conveyance.<sup>3</sup>

§ 470. *Purchasers pendente lite* are as much bound by the final result of a suit for partition as they are by the final result of any other suit pending in reference to the property at the time of their purchase.<sup>4</sup>

§ 471. *Administrators*.—We have already seen<sup>5</sup> that the administrator is not a proper party plaintiff in a suit for partition. The like rule applies to parties defendant, in ordinary circumstances.<sup>6</sup> But if the deceased cotenant is claimed to have been indebted to his cotenant for rents received, and an accounting as well as a partition is sought, the administrator is a proper party defendant.<sup>7</sup>

§ 472. *Claimants of Dower*.—We have shown in another chapter that the wife of a cotenant, having an inchoate right

<sup>1</sup> *Gorham v. Gorham*, 3 Barb. Ch. 41.

<sup>2</sup> *Heirs of Bryant v. Stearns*, 16 Ala. 306.

<sup>3</sup> *Hollingworth v. Sidebottom*, 8 Sim. 620; S.-C. 7 L. J. (N. S.) Ch. 2.

<sup>4</sup> *Partridge v. Luce*, 36 Me. 16; *Coble v. Clapp*, 1 Jones Eq. 173; *Welty v. Ruffner*, 9 Pa. St. 224; *Baird v. Corwin*, 17 Pa. St. 466.

<sup>5</sup> See sec. 454.

<sup>6</sup> *Foster v. Newton*, 46 Miss. 663.

<sup>7</sup> *Scott v. Guernsey*, 60 Barb. 181.

of dower in his moiety, is not a necessary party to a voluntary partition.<sup>1</sup> As the moiety of the husband was always liable to be turned into an estate in severalty by partition, voluntary or compulsory, it was thought that the wife whose interest was dependent on that of her husband ought not to be allowed to prevent or avoid a partition which was fairly made, and which left her interest as valuable as before. The same reasoning would apply with greater force to compulsory partitions; and we apprehend that the claim of the widow for dower, made after a compulsory partition, would, in all cases, in the absence of fraud, be confined by the Courts to the purparty which had been assigned to her husband. "The wife of a tenant in common is not a necessary party to a suit for partition. If an actual partition should be made, her right of dower will attach to the share allotted in severalty to her husband. This results, as a matter of course, without any decree or order of the Court, and, consequently, without her being before the Court as a party."<sup>2</sup> Where the husband, being a tenant in severalty, dies, and his estate descends to several heirs, his widow is not a tenant in common with the heirs. She is not therefore a proper party defendant in a suit brought by one of the heirs for partition. Any partition which they may procure must be subordinate to her rights as dowress. They need not—in fact they cannot—make her a party defendant, for she does not hold with them in common and undivided.<sup>3</sup> On the other hand, it has been insisted that the widow is a proper and necessary party to an action among the heirs for partition, and that it is erroneous to make a partition in her absence. Thus, in Virginia, where a partition was granted, as prayed for, subject to the widow's right of dower, the Court of Appeals reversed the decree, saying: "The widow and her husband should have been made parties, and her dower assigned, and partition should have been made of the residue. And it was error to have directed or confirmed a partition of said tract until such dower had been assigned." The case was therefore remanded, with instructions

<sup>1</sup> See sec. 411.

<sup>2</sup> *Matthews v. Matthews*, 1 Edw. Ch. 567; *Wilkinson v. Parish*, 3 Pai. Oh. 658; *Hoxsie v. Ellis*, 4 R. I. 124; *Motley v. Blake*, 12 Mass. 280.

<sup>3</sup> *M'Clintic v. Manns*, 4 Munf. 331; *Bradshaw v. Callaghan*, 8 Johns. 563.

to require the applicant to make the widow a party.<sup>1</sup> But where the husband is a tenant in common, instead of an owner in severalty, the right of his wife to dower can never be paramount to the right of the other cotenants to partition; and they may therefore, in suing for partition, make her a party defendant.<sup>2</sup> In such case, she would be bound by the partition, and her dower interest, as in case of partition in her husband's lifetime, would be removed from the large tract and attached to that assigned as her husband's share.

§ 473. When the premises are claimed as a homestead, the wife of the claimant is a necessary party defendant, because she is a party having or claiming an interest in the land.<sup>3</sup>

§ 474. Inchoate Claim of Dower in a Moieties—how affected by Sale.—Under voluntary as well as under compulsory partitions, both at law and in equity, no wrong, in the absence of collusion among the cotenants, could ordinarily arise from considering the wives of the respective cotenants as bound by the allotments made to their husbands, for notwithstanding such allotments, the wives still retained interests in the lands as valuable as those held by them prior to the partition. Through the operation of the partition, these interests were made more definite, and their value was enhanced rather than depreciated. But by virtue of statutes recently enacted in England, but long in force in most of the United States, Courts having jurisdiction in partition may order the property to be sold. A sale so made must convert realty into personalty, and thereby destroy the dower interests of the wives of the cotenants, unless the sale is to be treated as transferring title subject to those interests, or unless the Court makes such directions as are necessary to secure to the wife her just proportion of the proceeds of the sale. Where a sale of the premises is sought, the wife ought, at least, to be brought before the Court and allowed to contest the issue there tendered in regard to the necessity of the sale, for, by so doing, she may be able to retain her

<sup>1</sup> *Custis v. Snead*, 12 Gratt. 264.

<sup>2</sup> *Coles v. Coles*, 15 Johns. 322.

<sup>3</sup> *DeUprey v. DeUprey*, 27 Cal. 332.

inchoate right of dower. Hence, we find Chancellor Walworth stating that, "as a *feme covert* cannot be bound by a decree against her husband in a partition suit to which she is not a party, it seems to be proper, in all cases where a sale of the property will probably be necessary, that the wife should be joined with her husband as a party to the suit, so that the purchaser's interest in the premises may not be charged with her contingent claim of dower."<sup>1</sup> But Vice-Chancellor McCoun of New York held that it was immaterial whether the wife was made a party to the suit or not, "because a decree for sale and conveyance by a master will not bar her right of dower in her husband's share of the lands in the event of her surviving him."<sup>2</sup> He justified this decision on the ground that as nothing in the statute of that State expressly declared "a divestment of the dower initiate of a wife of a joint-tenant or tenant in common upon a sale," "nothing so materially affecting her legal rights ought to be taken by implication." The same Vice-Chancellor, in a subsequent case, expressed similar views, and sustained them with some very clear and satisfactory reasoning.<sup>3</sup> On appeal, this portion of the Vice-Chancellor's decision was reversed by the Chancellor, who determined: 1st, that the statutes of the State, though containing no direct provisions on the subject, clearly contemplated that the wife's right of dower should be discharged by the partition sale, "and that a purchaser under the judgment or decree will be protected against any future claim on her part, both in equity and at law;" 2d, that it was the duty of the Court to make such disposition of the sale "as may be necessary to secure to the wife a fair equivalent for the value of her contingent right of dower, in

<sup>1</sup> *Wilkinson v. Parish*, 3 Pai. Ch. 658; *Green v. Putnam*, 1 Barb. 506.

<sup>2</sup> *Matthews v. Matthews*, 1 Edw. Ch. 567; *Van Gelder v. Post*, 2 Edw. Ch. 577. In Georgia, the following emphatic and extravagant language was employed by the Supreme Court: "It may be said that the last section of the act of 1837 demonstrates that the Legislature foresaw that there would be recusant parties; and hence the provision to coerce the execution of deeds or other suitable conveyances in conformity with the decree or order of sale. And this may be true of those who are *sui juris*. But as we have already intimated, neither the husband, nor the Courts, nor any other human power, can compel the wife to relinquish her right of dower, inchoate though it may be when she is not asking the aid of the Court." *Royston v. Royston*, 21 Geo. 172.

<sup>3</sup> *Jackson v. Edwards*, 7 Pai. Ch. 391.



case she survives her husband.”<sup>1</sup> From this decision of the Chancellor an appeal was prosecuted to the Court of Errors. In this Court the only opinions given were those of Bronson, Judge, and Verplanck, Senator. The former agreed with the Vice-Chancellor, holding: 1st, that the wife’s right of dower was not affected by the sale; 2d, that the direction to invest a just portion of the proceeds of the sale for the benefit of the wife was an assumption of legislative prerogative. Senator Verplanck concurred with the Chancellor. Both the Judge and the Senator united in the view that the decision of this question was immaterial, and the case was therefore disposed of on other grounds.<sup>2</sup> So the question of the effect of a sale in partition upon the dower interests of the wives of cotenants, in the absence of provisions in the statute directly controlling the subject, may be considered as still unsettled in New York. Its further discussion was rendered unnecessary by the passage, in the year succeeding the final decision of *Jackson v. Edwards*, of a statute providing for the interest of the wife in accordance with the suggestions and directions contained in the opinion of the Chancellor, to which we have before referred. But in other States where the question has arisen, the Courts have been disposed to treat the sale in partition as conveying title paramount to the wife’s right of dower.<sup>3</sup> The case in which this question is best discussed is that of *Weaver v. Gregg*,<sup>4</sup> from which we extract the following:

“The question before us is one of legislative intention: Did the General Assembly, in providing for the sale of estates, in proceedings in partition, intend that the entire estate should pass to the purchaser divested of the wife’s inchoate right of dower? In seeking for the intention of the Legislature on this point, and in the absence of any clear and decisive expression of that intention in the language of the statute, it seems to us that the maxim, *argumentum ab inconvenienti plurimum valet in lege* very properly and forcibly ap-

<sup>1</sup> *Jackson v. Edwards*, 7 Pai. Ch. 411, 413.

<sup>2</sup> *Jackson v. Edwards*, 22 Wend. 512, 515.

<sup>3</sup> *Warren v. Twilley*, 10 Md. 39; *Lee v. Lindell*, 22 Mo. 202; *Sire v. St. Louis*, 22 Mo. 206.

<sup>4</sup> 6 Ohio St. 547.



plies; for, 'if the words used by the Legislature have a necessary meaning, it will be the duty of the Court to construe the clause accordingly, whatever may be the inconvenience of such a course. But unless it is very clear that violence would be done to the language of the act by adopting any other construction, any great inconvenience which might result from that suggested may certainly afford fair ground for supposing that it could not be what was contemplated by the Legislature, and will warrant the Court in looking for some other interpretation.' (Browne's Legal Maxims, 140, 141.) To apply this maxim to the case before us, let us suppose two coparceners, each the owner of an equal undivided half of an estate inherited from a common ancestor. One of them has a wife; the other is unmarried. One of them petitions for partition of the common estate, which is found to be incapable of actual partition, and is ordered to be sold. It is understood to be the settled law that the inchoate right of dower is not divested by the sale. The consequence is, inevitably, that the estate must be sold for much less than it would otherwise have brought. Yet, on the distribution of the proceeds of the sale, the husband comes in for an equal share, and the loss, consequent on the existence of such contingent incumbrance, falls alike on the unmarried and the married coparcener. This is a necessary result, and it is not only inconvenient but grossly unjust: too inconvenient and unjust to permit us to suppose it to have entered into the intention of the Legislature.

"We are of opinion, therefore, that it was the intention of the Legislature, by a sale in partition, to divest the wife of her inchoate right of dower. In so holding, we do not subject this right at all to the will or caprice of the husband. The sale is the act of the law, designed to do justice to joint owners, and render estates available, and put forth only when, from the fact that the estate is incapable of actual partition, the necessities of the case require it. The Legislature has deemed it more important to the public interest to render estates available to their owners without sacrifice of their value, by a sale, in case of necessity, than to preserve in all cases whatsoever the wife's remote and contingent interest, at the expense of parties on whom she can have no proper claim.

“On the whole, our view of the question is this: The right of dower in the wife subsists in virtue of the seizin of the husband; and this right is always subject to any incumbrance, infirmity, or incident, which the law attaches to that seizin, either at the time of the marriage or at the time the husband became seized. A liability to be divested by a sale in partition is an incident which the law affixes to the seizin of all joint estates; and the inchoate right of the wife is subject to this incident. And when the law steps in and divests the husband of his seizin, and turns the realty into personalty, she is, by the act and policy of the law, remitted, in lieu of her inchoate right of dower in the realty, to her inchoate right in a distributive share of the personalty into which it has been transmitted.”

§ 475. **Claimant in Dower, where Husband conveyed before Partition.**—The authorities to which reference has been made in the preceding section arose out of cases in which, when the sale in partition was ordered, the husband was still a cotenant, and therefore may be claimed to have represented his wife's inchoate right of dower. But a case determined by the Supreme Court of Indiana presents this novel feature, that the husband had conveyed the property before the proceedings for partition were instituted. Neither he nor his wife was a party to the partition; but the purchaser at the partition sale nevertheless claimed, that, under the authorities cited from the Ohio reports, the sale had divested the wife's inchoate right of dower. The Court did not “controvert the position that the rights of the wife in her husband's real estate are subject to legislative control while they remain *inchoate*,” nor the correctness of the decisions of the Ohio Courts; but it regarded the case before it as materially different from that determined in Ohio. The material difference referred to consisted in this, that, in the previous cases, the seizin of the husband had been divested by the act of the law, while in the case before the Court, the husband's seizin had been divested solely by his own act. As it was clear that the act of the husband could not defeat the wife's right of dower, it was thought that the subsequent partition, to which she was no party, and in which her estate

had no representation, must be equally powerless to prejudice her interests.<sup>1</sup>

§ 476. **Sale in Partition, where Widow is entitled to Dower.**—When a widow is entitled to dower by virtue of her late husband having had a sole seizin in the premises, her right, as we have before stated, is generally regarded as paramount to right of the heirs to compel a partition. This is equally true whether a division or a sale be sought. Courts have no authority, unless it is expressly conferred by statute, to compel a widow to accept a certain sum of money in lieu of her dower. She cannot be divested of her dower except by her own act.<sup>2</sup> But in some of the States the statutes in reference to partition authorize the widow to be made a party defendant, and empower the Court, in case a partition cannot be made, to decree a sale, and to award the widow a part of the proceeds, which she must accept in satisfaction of her dower.<sup>3</sup>

§ 477. **Husband of Cotenant.**—If a married woman, being a cotenant of real estate, be made a party defendant in a suit for partition without joining her husband, and a judgment be entered against her, such judgment is erroneous, because the Court ought not to have proceeded against the wife in the absence of her husband. This, however, is a mere error of proceeding, and does not render the judgment void. The wife is therefore bound by the partition, unless she procures the reversal or revocation of the judgment. But the life estate which the husband has in the lands of his wife cannot be affected by judicial proceedings to which he is not a party. He is therefore a necessary party defendant in an action for partition of lands of which she is a cotenant.<sup>4</sup>

§ 478. **Incumbrancers.**—The reason assigned for compelling a wife of a tenant in common to abide by a partition

<sup>1</sup> Verry v. Robinson, 25 Ind. 19.

<sup>2</sup> See sec. 472.

<sup>3</sup> Francisco v. Gates, 28 Ill. 67.

<sup>4</sup> Tanner v. Niles, 1 Barb. 562; Gordon v. Sterling, 13 How. Pr. 406; In the Matter of Sipperly, 44 Barb. 372.

<sup>5</sup> Pillsbury v. Dugan, 9 Ohio. 120; Foster v. Dugan, 8 Ohio, 106.

of lands to which she was not a party, namely, that her interest is inseparably connected with her husband's seizin, and must therefore be destroyed, restrained, or enlarged, as that seizin is destroyed, restrained, or enlarged, applies with equal force to persons having liens upon the moiety of any of the cotenants. Hence, when a partition is made, the interest of a lienholder, like the inchoate right of a wife to dower, is removed from the undivided moiety of the whole, and attached to the whole of the purparty assigned to the tenant in common against whose moiety the lien was a charge.<sup>1</sup> It is the rule at law and in equity, except where statutory innovations have been introduced, that holders of liens against the cotenant's cannot be affected by partition, except to the extent which we have just intimated. An incumbrancer, unless the statute so directs, therefore, is not a necessary party defendant, because no relief can be decreed against him.<sup>2</sup> It must be admitted, however, that there are cases which, while they do not controvert the rule that an incumbrancer is not a necessary party defendant, deny that a partition can have any effect whatever against him. Thus, in the case of *Colton v. Smith*,<sup>3</sup> a partition had been made between cotenants, one of whom had previously given a mortgage on his moiety. The mortgagee subsequently applied for partition. His application was granted on the ground that he could not be bound by the judgment in partition to which he was not a party.<sup>4</sup> In so far as the Court assumed that the mortgagee was not conclusively bound by the judgment against his mortgagor, it was undoubtedly correct. But we understand that a judgment in

<sup>1</sup> *Harwood v. Kirby*, 1 Pal. Ch. 471; *Thurston v. Minke*, 32 Md. 574; *Jackson v. Pierce*, 10 Johns. 417; *Loomis v. Riley*, 24 Ill. 307.

<sup>2</sup> *Baring v. Nash*, 1 Ves. & B. 551; *Wotten v. Copeland*, 7 Johns. Ch. 141; *Sebring v. Mersereau*, Hopk. Ch. 502; *Low v. Holmes*, 17 N. J. Eq. 150; *Speer v. Speer*, *McCartner*, Ch. 251. In one of the Upper Canada reports is a case in which the plaintiff in partition, being a mortgagee, was required to bring his mortgagor before the Court to join with him in the conveyance. (*McDougall v. McDougall*, 14 Grant's Ch. 267.) But this case is clearly contrary to all precedent. The opinion of the Court was based upon the theory that an incumbrancer occupied a position analogous to that of a lessee. This theory is incorrect. See sec. 479.

<sup>3</sup> 11 Pick. 314.

<sup>4</sup> See to same effect *Munroe v. Luke*, 19 Pick 40; *Bradley v. Fuller*, 23 Pick. 4. But sec. 43 of the statute of this State in regard to partition now provides that a person having a lien on the share of a part owner shall be concluded by the partition. (Genl. St. of Mass. ed. 1860, p. 702.)

partition, or even a voluntary partition, is so for binding upon mortgagees and other incumbrancers as to cast upon them the *onus* of showing that the allotments thereby made were unequal; and that until such a showing is made the partition cannot be disturbed. To permit a mortgagee or other incumbrancer, either before foreclosure or afterwards, to wantonly assail and destroy a prior partition, and to disturb possession taken and held thereunder, would certainly be a maladministration of the law. But if such mortgagee has a right to partition which cannot be denied without disregarding any well established rule of law, Courts may still prevent a malicious and inequitable exercise of that right by allotting to him the purparty already set off to his mortgagor, in all cases where the previous allotment has not been unjust.

§ 479. Incumbrancers, how affected by Sale.—When the subject-matter of a suit for partition is divided among the various cotenants thereof, the interests of each lienholder are sufficiently protected, because, by operation of law, his lien is attached to the whole of the property assigned to the cotenant against whose moiety it was charged. But when, instead of a partition, a sale of the property is ordered, it is evident that some means must be devised for the adjustment of the conflicting interests of the lienholders and of the purchaser at the sale. Even where a sale is sought, lienholders are not, in the absence of statutory provisions to the contrary, necessary parties defendant; because they cannot be affected by such sale.<sup>1</sup> “The business of the Court is not to draw into discussion various and conflicting rights and equities of incumbrancers. The property is divided *cum onere*. The true rule is no persons are to be made parties except those having a present interest in the premises.<sup>2</sup> When a lien became attached to the interest of one of the cotenants *pendente lite*, the purchaser took the premises discharged of the lien; and

<sup>1</sup> 1 Wait's P. 186; Owsley v. Smith, 14 Mo. 155; Matter of Harding, 3 Ired. 322; Thurston v. Minke, 32 Md. 574.

<sup>2</sup> Sebring v. Mersereau, 9 Cow. 345; S. O. Hopk. Ch. 502. But in Pennsylvania a sale in partition, like all other judicial sales in that State, transfers the property free of all liens. Gerard Life Ins. Co. v. F. & M. Bank, 57 Penn. St. 394; S. O. 7 Am. Law Reg. 467. See also Sackett v. Twining, 18 Penn. St. 202; Jacobs' Appeal, 23 Penn. St. 477; Allen v. Gault, 27 Penn. St. 473.

the lien became a charge on the cotenant's share of the proceeds of the sale.<sup>1</sup> If no means were provided by which the existence of liens against a cotenant's moiety could be brought to the attention of the Court, great injustice would be done. The lands would be sold at a sacrifice owing to the existence of such liens; while the cotenant against whose moiety the lien existed would claim his proportion of the proceeds of the sale, without allowing any deduction on account of the lien. The authority of Courts to order a sale of the property of cotenants is based upon statutes all of a comparatively modern date. These statutes will, on examination, be found to contain provisions by means of which either of the cotenants in the partition suit may have all the liens chargeable upon the property ascertained, and may have such a disposition made of the proceeds of the sale as will protect him from loss. In some of the States, the lienholders must be made defendants; in others, they may be made defendants or not, at the option of the parties to the partition suit. Lienholders may intervene in some of the States, or may apply on motion, and thereby affirmatively assert their lien and procure an order for its payment out of the proceeds of the sale.<sup>2</sup> A lienholder thus coming before the Court will not be sustained in demanding anything upon which neither of the cotenants could legally insist. Hence, if, under the statute, a sale may be ordered to be made on credit, a lienholder cannot compel it to be made for cash, in order that his claim may thereby be paid.<sup>3</sup>

§ 480. A lessee of a moiety has an interest which cannot be divested without making him a party. The cotenants may, if they choose, go on and have a decree of parti-

<sup>1</sup> *Westervelt v. Haff*, 2 Sandf. Ch. 101; *Cradlebaugh v. Pritchett*, 8 Ohio St. 649; *Church v. Church*, 3 Sandf. Ch. 497; *Loomis v. Riley*, 24 Ill. 310.

<sup>2</sup> *Garvin v. Garvin*, 1 S. C. (N. S.) 60; *Simons v. Simons*, Harp. Eq. 256.

<sup>3</sup> *Stern v. Epstein*, 14 Rich. Eq. 7. For statutory provisions in regard to lienholders, see Code of Ala., sec. 3114; Laws Arizona, p. 426, sec. 268; p. 427, secs. 274-6; p. 429, sec. 283; Cal. Code C. P., secs. 761, 769; Code of Iowa, secs. 3281, 3284-89; Kansas Code C. P. sec. 616; Rev. St. Me., p. 697, sec. 28; Comp. Laws Mich., ed. 1871, secs. 6273-4; Bissell's St. of Minn., p. 889 and 890, secs. 48, 46, 51, 52; Rev. Code Miss., sec. 1836; C. C. P. of Neb., sec. 804; Comp. Laws Nev., secs. 1344, 1346-7; Nixon's Digest, Laws of N. J., 4th ed., p. 669, sec. 14; 3 Rev. St. N. Y., pp. 605, 611, secs. 11, 12, 13, 51; Thompson & Steger's St. of Tenn., secs. 8909-15; Deady's Laws of Oregon, sec. 421.

tion without bringing him before the Court. By such partition, the legal title vests in the assignees of the various purparties, subject to the equities of the lessees who were not parties.<sup>1</sup> But whenever it is proposed by the partition to affect the rights of lessees, they must be made parties defendant, or in some other manner brought before the Court.<sup>2</sup>

§ 481. **Disseizors.**—In most of the States, proceedings for partition cannot be sustained while the property to be divided is held adversely to the petitioner. But even in those States where the disseizin of the applicant presents no obstacle to his procuring a partition, the disseizor is not a necessary party defendant unless his adverse possession has continued for a sufficient period to ripen into title, and has thereby made him a cotenant.<sup>3</sup>

§ 482. **Persons not in Esse.**—If several remainders are limited by the same deed, this creates a privity between the person in remainder and all those who may come after him; and a verdict and judgment for or against the former may be given in evidence for or against any of the latter.<sup>4</sup> But there seems to be a conflict of opinion as to whether the same privity exists between a tenant for life and a reversioner, unless the latter has identified himself with the litigation out of which the judgment resulted, as by being made a party to the proceedings by said prayer.<sup>5</sup> “If there are ever so many contingent limitations of a trust, it is an established rule, that it is sufficient to bring the trustees before the Court, together with him in whom the first remainder of inheritance is vested; and all that may come after will be bound by the decree though not *in esse*, unless there be fraud and collusion between the trustees and the first person in whom the remainder of inheritance is vested.”<sup>6</sup> According to the views entertained and expressed by Lord Redesdale, “it is sufficient to bring before

<sup>1</sup> Pleak v. Chambers, 7 B. Monr. 570.

<sup>2</sup> Thurston v. Minke, 32 Md. 575; Fitzpatrick v. Wilson, 12 Grant's Ch. 440; Cornish v. Gest, 2 Cox's Ca. 27; Calvert on Parties, 349.

<sup>3</sup> Tilton v. Palmer, 81 Me. 488.

<sup>4</sup> Pyke v. Crouch, 1 Ld. Raym. 730.

<sup>5</sup> Adams v. Butts, 9 Conn. 79; Ph. Ev. 14-5.

<sup>6</sup> Hopkins v. Hopkins, 1 Atk. 590.



the Court, the first tenant-in-tail in being, and if there be no tenant-in-tail in being, the first person entitled to the inheritance, and if no such person, then the tenant for life. It has been repeatedly determined, that if there be tenant for life, remainder to his first son-in-tail, remainder over, and he is brought before the Court before he has issue, the contingent remainder-men are barred."<sup>1</sup> But in Maryland where one-sixth of certain property was devised to the testator's daughter "*during her life, and after her decease to her male children on her body lawfully begotten or to be begotten,*" a bill in equity was filed against this daughter and her two sons, by other part owners of the land, alleging that a partition could not be advantageously made, and praying for a sale of the land and the distribution of the proceeds. A decree was subsequently entered in accordance with this prayer, and was succeeded by the sale of the property thereunder. After the death of the daughter, her five sons commenced an action of ejectment to recover possession of one-sixth of the land. Three of the sons had been born since the rendition of the decree under which the sale had been made; and it was contended that as they were not *in esse* they could not be bound by the decree. The Court held that their interest could not be destroyed by their mother, as life-tenant, nor by their living brothers; "that their rights under the will were indestructible by any act of the parties having interests prior to or in common with them," and, therefore, that they were not prejudiced by the decree of sale and the proceedings had in pursuance thereof.<sup>2</sup> The difference between the conclusions reached by the Court in Maryland and those announced by Lord Redesdale is this: that in Maryland some person must be brought before the Court having an estate of inheritance, and who is, on that account, entitled to represent both his own interests and the interests of all who may claim after his death; while, according to Lord Redesdale, if there be no person in existence possessing an estate of inheritance, then the tenant for life may be brought before the Court and treated as the representative of persons who may, by their subsequent birth, acquire interests in the estate. The views

<sup>1</sup> Giffard v. Hort, 1 Sch. & Lef. 407.

<sup>2</sup> Downin v. Sprecher, 35 Md. 478.



of Lord Redesdale are sustained by a majority of the reported adjudications on this subject.<sup>1</sup> The rule that "the person entitled to the first indefeasible estate of inheritance is allowed to represent all persons who are entitled to subsequent estates" is as applicable to suits in equity for partition as to any other suits.<sup>2</sup> "A tenant for life of an undivided share of an estate with remainder to his unborn sons-in-tail may file a bill for partition, and the decree will be binding on the sons when they come into *esse*."<sup>3</sup> An English case recognizes an exception to this principle of virtual representation, by denying its applicability in cases where the person seized in fee is liable to have his seizin defeated by a conditional limitation or an executory devise, because, in that event, the estate is insufficiently represented by the person holding the first vested estate of inheritance.<sup>4</sup> This exception is repudiated so far as it seems to be noticed in the United States.<sup>5</sup>

§ 483. **Unknown Owners.**—In most of the States, the statutes in reference to partition have been designed to furnish all the means necessary to make a partition binding and valid as against all persons. In order to achieve this result, it was essential that some method should be provided by which all parties in interest could be brought before the Court. As these parties could not always be known to the applicant, he was authorized to proceed against such as were not known to him by the general designation of "unknown owners." When the proceedings against the unknown owners were conducted in compliance with the statute and culminated in a final judgment or decree of partition, the cotenants not named in the proceedings were as much bound as those who were so named.<sup>6</sup> Of course, if the proceedings

<sup>1</sup> *Faulkner v. Davis*, 18 Gratt. 684; *Baylor's Lessee v. Dejarnette*, 13 Gratt. 152; *Gaskell v. Gaskell*, 6 Sim. 643; *Freeman v. Freeman*, Tenn., April Term, 1872, 2 South. L. R. 168; *Calvert on Parties*, 58; *Dayrell v. Champness*, 1 Eq. Cas. Ab. 400; *Leonard v. Sussex*, 2 Vern. 527; *Finch v. Finch*, 2 Ves. Sr. 492.

<sup>2</sup> *Freeman on Judgments*, sec. 306; *Wills v. Slade*, 6 Ves. 498; *Cheeseman v. Thorne*, 1 Ed. Ch. 629; *Clemens v. Clemens*, 37 N. Y. 59.

<sup>3</sup> *Calvert on Parties*, p. 60, 259.

<sup>4</sup> *Goodess v. Williams*, 2 Y. & C. 595.

<sup>5</sup> *Mead v. Mitchell*, 17 N. Y. 210.

<sup>6</sup> *Cole v. Hall*, 2 Hill, 627; *Rogers v. Tucker*, 7 Ohio St. 428; *Foster v. Abbot*, 8 Met. 598; *Marvin v. Titaworth*, 10 Wis. 320.

necessary to procure jurisdiction against the unknown owners are omitted, the judgment based upon such proceedings must be void. But in the prosecution of inquiries in regard to jurisdictional facts, upon which the proceedings of courts of record are based, the Courts of the different States are by no means harmonious. Some of them insist that such inquiry must be confined to an inspection of the papers constituting the judgment roll; others have no hesitation in employing any evidence tending to disprove the existence of jurisdictional facts wheresoever it may be found, even against the express jurisdictional declarations made upon the record.<sup>1</sup> And so in regard to proceedings in partition, a diversity of opinion would no doubt be manifested upon the question whether these proceedings, though conducted in a court of record, were to be supported by the same jurisdictional presumptions which ordinarily attend the judgments and decrees of such courts. For in some of the States, these proceedings, being of a statutory origin and controlled by statutory provisions, would be regarded as in derogation of the common law, would be strictly scrutinized, and would be received with no greater deference than though emanating from a court of special and limited jurisdiction; while in other States, the Court exercising jurisdiction over an action for partition, though pursuing its jurisdiction and regulating its proceedings in accordance with the statute, would nevertheless be regarded, even as to those proceedings, as a court of general jurisdiction, and its judgments would import the same uncontrollable verity as though rendered in the exercise of its general common law authority.<sup>2</sup> Hence, when a judgment or decree in partition against unknown owners is collaterally called in question, we may expect to find that some courts will refuse to give it effect unless all the facts authorizing the proceeding against "unknown owners" are shown to have existed;<sup>3</sup> whilst other courts will require the absence of these facts to be affirmatively established, and will incline to consider mere defects in the proceedings as involving nothing beyond the erroneous exercise of established juris-

<sup>1</sup> Freeman on Judgments, Chapter VIII.

<sup>2</sup> *Ib.*

<sup>3</sup> *Denning v. Corwin*, 11 Wend. 652.

diction.<sup>1</sup> But whenever a judgment or decree in partition cannot be attacked and overthrown, by such investigation in regard to jurisdiction as may be permissible under the laws of the State, it is, when against unknown owners, conclusive not only upon every person owning a moiety of the property, but *also upon all claimants in severalty*. Nor does it seem to make any exception to this general rule that such owner in severalty was, at the time the proceedings were being prosecuted against him as an unknown owner, in the actual and open possession of the premises partitioned. The leading case on this subject is that of *Cook v. Allen*,<sup>2</sup> decided by Chief Justice Parsons in the year 1807. This was an action on a writ of entry. The demandant gave in evidence before the jury the record of a suit in partition. From this record it appeared that one Reed, under whom the plaintiff claimed, filed a petition for partition, alleging that he was seized as a tenant in common, *with divers persons to him unknown*, of one thousand acres of land. "Notice of the petition was given to all persons interested, that they might show cause against granting the prayer of it. Afterwards, on proclamation being made for any person to appear and show cause, no person appeared, and the first judgment, *quod partitio fiat*, was entered. Pursuant to this judgment, *Reed's* purparty was regularly set out and assigned to him, which included the premises; and a final judgment was rendered that he and his heirs hold the part thus assigned, in severalty, forever. The tenant, to defeat this title, gave in evidence the entry of one *Jonathan Frye* into the lands more than thirty years past; that he afterwards mortgaged them to the present tenant, who foreclosed the mortgage, by judgment and execution, according to the statute in such case provided; and that he, the tenant, has continued in possession ever since. From this evidence, he insisted that *Reed* and the other tenants in common were dis-seized by *Frye*; that at the time of the partition their right to enter was gone; and that he not appearing to defend against *Reed's* partition, and not claiming as a tenant in common, was not concluded by the judgment on that petition,

<sup>1</sup> *Cole v. Hall*, 2 Hill. 627; *Waltz v. Barroway*, 25 Ind. 381; *Hynes v. Oldham*, 3 Monr. 266.

<sup>2</sup> 2 Mass. 467.

even as to the right of possession." The Court in which the action was tried instructed the jury in favor of the tenant. The demandant excepted to the instructions, and appealed to the Supreme Court. This Court set aside the verdict, and granted a new trial, giving the following reasons for so doing:

"A writ of partition must name all the tenants who hold together and undivided, either as plaintiffs or defendants; the shares of each must be alleged; and the partition must be made among them all. In this State, very large parcels of land are holden in common, the tenants are numerous, and frequently unknown to each other, and their shares unascertainable. Partition, so necessary for the settlement and cultivation of lands, is therefore impracticable by writ at common law. Inconveniences of this kind heretofore prevailed in *England*, and they were remedied by an act of Parliament, passed 8 and 9 Will. 3, c. 31. This act, after providing that to a writ of partition no plea in abatement shall be received, and that it shall not abate by the death of any of the tenants, enacts that, if any tenant to the writ shall not enter an appearance within fifteen days after the return of the attachment—notice having been given of such writ by leaving a copy thereof, forty days before the return, with the occupier or tenant in possession, or, if he cannot be found, with his wife, son, or daughter—the Court may proceed to examine the demandant's title, and give judgment on default for his purparty; and his purparty being regularly assigned by an execution of that judgment, the partition shall be good, *and conclude all persons whatever, whatever right or title they had in the premises*, although all persons concerned were not named in any of the proceedings, nor the title of the tenants truly set forth; and a power is given to the Court, within a limited time, to permit a tenant against whom judgment has been rendered by default to plead in bar, or to show an inequality in the partition.

"The inconveniences of partition by writ according to the course of the common law were, in this State, remedied by a temporary provincial act, passed 22 G. 2, c. 3. This act, after several continuances, expired, but its provisions were re-enacted, with some new regulations, by the statute first men-

tioned, and which is the foundation of the partition in the case. By virtue of this statute, a person interested with others in land may file his petition, showing his purparty, and that others (naming them) hold the premises together and undivided with him, and may pray for the severance of his purparty. Of this petition, those others named are to be notified personally, or by leaving a copy of it at their last place of abode, if practicable.

“If the petitioner does not know the cotenants, he may allege that he holds his purparty, together and undivided with others to him unknown. In this case, notice is to be given to all persons interested, by publishing the substance of the petition, three weeks successively, in one or more of the public newspapers as the Court may direct. If partition be regularly made, pursuant to the petition, it is declared to be *valid to all intents and purposes*, which words are of as large import as the provision of the *English* statute, where the partition is declared *to conclude all persons whatever*, whatever may be their right and title to the premises. But it is reasonable to give the words a construction by which no person shall be concluded by a partition, when he could not, by law, be admitted to defend his rights. This construction is conformable to a maxim of the common law, that judgments do not bind the rights of any but parties or privies; understanding by parties all persons who might have been made parties on the record but from their own laches. In applying this construction to the statute before us, when in the petition certain persons are named as cotenants, if partition be made, none are concluded by it but the persons named, their heirs and assigns. If in the petition the cotenants are not named, but are supposed to be unknown to the partitioner, and notice is given to all persons interested to appear and show cause against the partition, and partition be made, no person appearing, this partition shall conclude all persons whatever, as to their right of possession. Any person interested was authorized to appear, and, by falsifying any allegation of the petition in a point material to his defence, might have protected his interest. But if he will lie by and refuse to appear, it is a consent that the petition may proceed *ex parte*; and he

shall be bound by the partition as fully as if he had appeared, and afterwards made default.

“In a writ of partition, the plaintiff alleges that all the parties to the writ hold together and undivided; so in the petition where the cotenants are not known or named, the petitioner, by declaring that he is seised of an undivided share of the land, in effect alleges that all persons holding the land, or any part of it, are seised as cotenants with him; and when judgment is rendered in partition, all the allegations material to the rendition of the judgment are to be considered as facts, and all persons concluded by the judgment are estopped from controverting them. In this case, therefore, *Allen*, the tenant, cannot be admitted, by showing a disseisin of all the tenants in common, to question the right of *Reed*, alleged in his petition, and supported by the judgment; as he cannot be considered as a stranger to the record, and so not bound by it. He was on the land at the time of the partition, claiming an interest in it; he was notified to appear and defend his interest; he might have appeared and have been admitted a party on the record. He did not choose to do it; and it is owing to his own laches that he did not defend his interest, if he had any to defend. To consider him, under these circumstances, as a stranger to the record, is repugnant to a well-known rule of law; for he would take advantage of his own laches.

“The remaining objection made by the tenant against the effect of the partition is that, upon the true construction of the statute, the right of possession of no person is, in fact, bound by any proceeding under it but a tenant in common. It is a sufficient answer to this objection, in this case, that, the tenant having been notified of the petition, in which it appears that the petitioner claimed to hold with him, together and undivided, the premises, and having a legal right to appear and controvert the petition, and judgment being rendered on his default, he is now concluded from saying that he is not a tenant in common.”<sup>1</sup>

In the case from which the preceding quotation has been

<sup>1</sup> *Cook v. Allen*, 2 Mass. 467; *Baylies v. Bussey*, 5 Greenl. 157; *Foxcroft v. Barnes*, 29 Me. 129; *Kane v. Rock River Canal Co.* 15 Wis. 186.

made, it does not clearly appear whether the tenant had personal knowledge of the pendency of the suit for partition or not, but from the imputation of laches thrown upon him in the opinion of the Court, we infer that he had such knowledge. But it is probable that this circumstance was immaterial. In a case determined by the Supreme Court of Wisconsin, the person in possession claiming in severalty had no notice of the suit for partition, except the constructive notice given him by the publication against unknown owners. In considering the effect of this partition, Dixon, Chief Justice, said: "The position assumed by the respondents' counsel in the argument of the case, I must say, appeared to me novel and somewhat extraordinary. It seemed to me that if they were correct, we should, so far as the appellants are concerned, be compelled to give one of the most unjust judgments ever pronounced in a court of justice; that every sentiment of equity and justice demanded of us to uphold them in their title and possession, or at least to give them their day in court for the purpose of establishing them. The idea that, under our statute for the partition of real estate, a party in the quiet and undisturbed possession of his property could be stripped of it by a judicial proceeding, of which he was entirely ignorant, struck me as being so flagrantly and enormously unjust and oppressive, that I thought it could not be the law. The taking of a valid title of a person in possession from him and transferring it to another having no right to it by a proceeding of which the owner has no knowledge, and in which the title was not directly adjudicated, nor the attention of the Court directly called to it, exhibits a most alarming defect in justice. Such a proceeding is opposed to all our notions of law and justice, and we search with anxiety for some mode of escape from it.

"It is not by the rules of the common law, which Courts are at liberty to mould and modify to meet the ends of justice, but by the declarations of the Legislature upon a subject confessedly within their control, that we are to determine this case. They, not the Court, are responsible for the unjust consequences which may flow from its decisions. They have prescribed the mode in which parties shall be brought into court, the form of the proceedings, and the effect of the judg-



ment in actions like that under which the respondent claims title. The same power which authorized the wrong must apply the remedy." His Honor then proceeded to quote from and concur with the opinion of Judge Parsons in the case of *Cook v. Allen*; and added: "I have quoted at length from this opinion, partly because it was not noticed at the trial, but more for its sound reasoning, and because the necessity and policy of the law in providing for proceedings against property of persons unknown is clearly shown. If judgments in such proceedings are not to be held binding and conclusive on all such persons having an interest both as to the amount and nature of their interests, like other judgments, then the mischiefs to be remedied cannot be reached, and partition in many cases becomes an impossibility. The law makes the allegation that they are unknown, and publication of notice equivalent to a suit against them by name when they are known, and personally served with process. If the defendant Church had been sued by name and served with process, and had made default, no one can doubt that such default would have been a confession by him according to the allegations of the complaint, that he was a tenant in common. The statute gives precisely the same effect to the proceeding in the form in which it was had."<sup>1</sup>

<sup>1</sup> *Nash v. Church*, 10 Wis. 311. See also *Herr v. Herr*, 5 Penn. St. 428.

**ALABAMA.**—The Code of this State (sec. 3106) requires the applicant to set forth the names of all the persons interested in the property. All parties in interest (see sec. 3107) must have notice of the hearing of the petition, and if any of the parties are infants or of unsound mind, guardians *ad litem* must be appointed to represent them. Non-residents are made parties in the same manner as when property in the hands of an administrator is to be distributed. By sec. 3114, a lien on an undivided interest becomes a charge on the share assigned to the holder of such interest.

**ARKANSAS.**—All persons interested in the property must be parties, including tenants for years, for life, by curtesy, or in dower; persons entitled to the reversion, remainder, or inheritance; and persons who on any contingency may become entitled to any beneficial interest. Persons entitled to dower, if the same has not been ad-measured, are necessary parties.—Gould's St. of Ark., ed. 1858, p. 811, secs. 2 and 3. The statute also provides for proceeding against unknown owners.—*Ib.*, secs. 4 to 7.

**CALIFORNIA.**—The interests of all persons, known and unknown, must be set forth, unless they claim under a conveyance or incumbrance not on record. The summons is directed to all of the cotenants, all persons having any interest in or lien on the property or any part thereof, and generally to all persons unknown.—Code C. P.,



secs. 753, 754, 756. If it appears to the Court that lienholders exist in addition to those made parties to the suit, the Court may order them to be made parties.—*Ib.* sec. 761.

CONNECTICUT.—The statute of this State does not make any specification of the persons who must be defendants.

DELAWARE.—The only provision in the statute in regard to defendants is that the summons shall issue to the persons interested who have not joined in the petition.—*Rev. St.*, ed. 1874, p. 529, sec. 8.

FLORIDA.—The petition must be against the cotenants or others interested. If the names of some of the owners are unknown, this fact may be stated in the bill, and the suit may then proceed as if they were named.—*Bush's Digest*, p. 616-17, sec. 2.

GEORGIA.—The Code of this State contains no provisions directing who shall be made parties defendant.

ILLINOIS.—The statute of this State in regard to parties and to proceedings against unknown owners is like that of Arkansas.—*See Gross' St.*, p. 469-70, secs. 2-6. Courts of Chancery have power to assign dower in suits for partition.—*Ib.*, p. 471, secs. 15, 16. Lienholders have been adjudged to be necessary parties.—*Loomis v. Riley*, 24 Ill., 310.

INDIANA.—The petition must set forth the rights and titles of the parties interested in the property. On each of these parties summons must be served.—*Rev. St.*, ed. 1852, vol. 2, p. 329, secs. 2, 3. The statute also provides for proceeding against unknown owners.—*Ib.*, secs. 3, 4.

IOWA.—The interests of the several owners, if known, must be described. Persons having contingent interests, and holders of specific or general liens on the entire property, may be parties.—*Code of Iowa*, ed. 1873, secs. 3278-81. If the lien be on an undivided interest, the holder must be made a party.—*Ib.*, sec. 3287. When the owner of a share sold has a husband or wife living, who does not agree in reference to the disposition of the proceeds of the sale, the Court must direct such proceeds to be invested in real estate, taking the title in the name of the person whose share has been sold.—*Ib.*, sec. 3303.

KANSAS.—The provisions of the statute of this State are similar to secs. 3278-81 of *Code of Iowa*, cited above.—*See Genl. St. of Kans.*, ed. 1868, p. 753-4, secs. 615, 616.

KENTUCKY.—The statute seems to contemplate that all persons interested shall be parties. If defendant be *feme covert*, infant, or insane, notice may be given to the husband, guardian, or committee, or if there be no guardian or committee, one may be appointed for the occasion.—2 *Stanton's Rev. St.*, p. 101, sec. 2.

MAINE.—No parties seem to be necessary defendants except the other cotenants.—*Rev. St. of Me.*, ed. 1871, p. 694, sec. 2.

MASSACHUSETTS.—The petition for partition must be against all persons known to the petitioner to have any interest in the premises who would be bound by the partition, whether they have estates of inheritance, for life or years, in possession, remainder or reversion, whether vested or contingent. If the petitioner has an estate for life or years, the person entitled to the reversion or remainder is entitled to notice.—*Genl. St.*, ed. 1860, p. 699, sec. 6. Process may be served on unknown owners.—*Ib.*, sec. 10.

**MICHIGAN.**—Every person having any interest in the premises, including tenants for life, for years, by the curtesy, in dower, reversioners, remainder-men and persons having contingent interests, may all be made parties.—Comp. Laws, ed. 1871, secs. 6269-70. Holders of specific liens may be parties.—Ib., 6273-4. The interests of tenants in dower may be sold or not, at the option of the Court.—Ib., 6310-11.

**MINNESOTA.**—The summons is addressed to all known owners and lienholders, and also to unknown owners.—Bissell's St., p. 888, sec. 35. The Court may provide for ascertaining the value of inchoate rights of dower, etc.—Ib., p. 892, sec. 62.

**MISSISSIPPI.**—"Before any decree for partition shall be made in any case, every person claiming or having an interest in the lands, and who has not joined in the bill, shall be made a party to the proceeding; and every minor shall also be represented by a discreet and careful guardian *ad litem*, whether he has a legal guardian or not."—Rev. Code, ed. 1871, sec. 1817.

**MISSOURI.**—Every person having any interest in such premises, whether in possession or otherwise, shall be made a party.—Rev. St., ed. 1865, p. 612, sec. 4. The summons may also be against unknown owners.—Ib., secs. 5-7.

**NEBRASKA.**—The petition must describe the several interests of the joint owners, if known.—Code C. P., sec. 802. Lienholders may be made parties, at the option of petitioner.—Ib., sec. 804. The interests of tenants in dower may be secured by investment made under the order of the Court.—Ib., sec. 831.

**NEVADA.**—Substantially as in California.—Comp. Laws, ed. 1873, secs. 1329, 1331, 1332, 1336.

**NEW JERSEY.**—We find no special designation of necessary parties defendant in the statute of this State, except that reversioners and remainder-men may be made parties and bound by the partition.—Nixon's Digest, 4th ed., p. 673, secs. 33, 34. Provisions are made for dower interests.—Ib., p. 670, sec. 23; p. 672, secs. 29, 36, 44.

**NEW HAMPSHIRE.**—All persons interested, if known, seem to be necessary parties. Summons may be issued against and service made on unknown owners.—Genl. St., ed. 1867, p. 463.

**NEW YORK.**—All parties in interest may be made defendants.—3 Rev. St., 5th ed., p. 605, sec. 9. Lienholders need not be parties.—Ib., sec. 11. The proceeding may be against unknown owners.—Ib., secs. 15, 16. Tenants in dower may be parties.—Ib., p. 609, secs. 33, 59, 63-68. If a sale is to be made, lienholders are notified.—Ib., p. 611, sec. 52.

**OHIO.**—"The demandant in each and every partition shall give notice, in some newspaper in general circulation in each county where the lands lie, or shall give personal notice in writing, to each and every person concerned, their agent or attorney."—Swan's & Sawyer's Rev. St., p. 504. A widow entitled to dower is a necessary party, unless it has been assigned.—Swan's Rev. St., ed. 1854, p. 592, secs. 12, 13.

**OREGON.**—The statute of this State is like that of California.—Deady's Genl. Laws, ed. 1864, p. 258, secs. 420-21.

**PENNSYLVANIA.**—All the parties in interest shall be named in the writ, declaration, and notices, when known.—2 Brightly's Purdon's Digest, p. 1115, sec. 16. Persons not in esse cannot be bound by suit in partition, except at the suit of a cotenant having an indefeasible estate in fee in the moiety claimed by him.—Ib. 1117, sec. 80.

**SOUTH CAROLINA.**—Summons shall be served on all the persons interested, and they shall be made parties.—Rev. St., ed. 1873, p. 531, sec. 5.

**TENNESSEE.**—Every person having any interest, in possession or otherwise, and every person entitled to dower, if the same has not been allotted, shall be a party.—Thompson & Steger's St. of Tenn., sec. 3271. Unknown owners may be proceeded against.—Ib., secs. 3273-75.

**VERMONT.**—The petition must set forth the names of the several owners, as far as known; and notice must be given to all parties interested.—Genl. St. of Vt., p. 353, secs. 2, 3.

**WISCONSIN.**—All persons interested are necessary parties defendant, including tenants for years, for life, by the curtesy, in dower, in reversion, or remainder.—Taylor's St. of Wis., p. 1679, secs. 4, 5. Lienholders may be made parties.—Ib., secs. 7-9.

## CHAPTER XXIII.

### THE APPLICANT'S PLEADINGS.

The Declaration at Common Law, § 484.

The allegation that the Parties *hold* together, § 485.

The Deraignment of Title, § 486.

The Description of the Premises, § 487.

The Statement of the Moieties of the respective Parties, § 488.

Variance between the Interest Stated and that Proved, § 489.

Allegation of a Demand for Partition, § 490.

Allegation of necessity of a Sale, § 491.

The Replication, § 492.

The Service of Process, § 493.

The Defendant's Default, § 494.

§ 484. **The Declaration or Bill for Partition.**—The diversity existing between the statutes of the several States governing the subject of partition—prescribing the estates of which partition may be made, and the persons competent to compel such partition—must give rise to a corresponding diversity in the pleadings by the aid of which a demand for partition is sought to be asserted or repelled. The first inquiry of the practitioner about to prepare a petition, complaint, or bill for partition, is naturally addressed to the statute of his own State, for the purpose of ascertaining what, under it, constitutes a good cause of action. Especially under the liberal rules of pleading now recognized in many codes of practice, requiring of the pleader nothing beyond the statement of his cause of action in ordinary and concise language, it is more important that he should be sure that he has stated all the material facts upon which his claim depends, than that he should adopt any particular form or order of expression. The same facts which entitled a cotenant to partition at law were sufficient to enable him to successfully invoke the powers of Courts of Chancery. From

this substantial identity of causes of action, logically followed a substantial identity in the pleadings by which the causes were stated to the different Courts. Except where some special ground existed, on account of which Chancery was called upon to furnish some relief beyond that contained in a mere decree of partition, the allegations contained in a bill for partition corresponded with the allegations to be found in the declaration in proceeding at law under the writ. The declaration at law may still serve as a guide to the pleader, if he takes care to add such averments as the statute of his State has made essential, and to omit such as it has made immaterial. It is therefore proper that we should analyze the declaration, and consider of what its material allegations consist.<sup>1</sup>

§ 485. The first material allegation to be found in the declaration at common law is that the parties "hold together and undivided." This word "hold" was always understood as implying a tenant of the freehold. The allegation that they hold together and undivided was therefore equivalent to averring that the plaintiff and defendants are

The following form of a declaration at law by a tenant in common is given in standard works on pleading and practice:

"—— to wit: E. F., of ——, in the county aforesaid, was summoned to answer A. B. and C. D. of a plea, wherefore, whereas the said A. B., C. D., and the said E. F., hold together and undivided the manor of ——, with the appurtenances, etc., [specify the premises according to the writ,] of which the said E. F. desireth partition to be made between them according to the form of the statute in such case made and provided, and unjustly permitteth not the same to be done, and contrary to the form of the statute: And whereupon the said A. B. and C. D., by their attorney, say, that whereas they and the said E. F. hold together and undivided the tenements aforesaid, with the appurtenances, whereof it belongs to the said A. B. and C. D. and their heirs, to have one moiety of the tenements aforesaid, with the appurtenances, to hold them in severalty, so that the said A. B. and C. D. of their moiety belonging to them of the tenements aforesaid, with the appurtenances; and the said E. F. of his moiety belonging to him of the tenements aforesaid, with the appurtenances; may severally apportion themselves; he of the said E. F. denieth partition thereof to be made between them, according to the form of the statute in such case made and provided, and unjustly permitteth not the same to be done, and contrary to the form of said statute; whereupon they say that they are injured, and have damage to the value of —— . And therefore they bring suit," etc.—2 Sellen's Pr. 216-7; 3 Chitty's Pl. 1301. Where the declaration is by one coparcener against another, it contains, in addition to the allegations of the above declaration, the statement that the ancestor was seized; that being so seized, he had issue certain daughters [naming them]; that the estate had descended to such daughters, etc.—3 Chitty Pl. 1397; 3 Danl. Ch. Pr. 4th ed. 2027.

tenants in common of a freehold, and negatived the idea that the plaintiff was disseized. The seizin of the plaintiff was always at common law essential to the maintenance of his action.<sup>1</sup> But this seizin was regarded as sufficiently stated by the use of the word "hold," and was not required to be alleged in any other form.<sup>2</sup> The most usual practice in complaints under the code seems to be to aver, in express terms, that the plaintiff is in possession, or that he is seized.<sup>3</sup> That the plaintiff is in possession will always be "presumed from the allegation that the parties are seized in common."<sup>4</sup>

§ 486. *Deraignment of Title.*—When the partition was between tenants in common, the declaration contained no reference to the source of title. If by one parcener or joint-tenant against another, it was necessary to show how they became joint-tenants or parceners.<sup>5</sup> But even in the case of coparceners, it was sufficient to allege that the common ancestor was seized, and to show that by his death the lands had descended to the coparceners. So far as we are aware, it has never been held to be necessary in applying for a partition, whether at law or in equity, to show any deraignment of the plaintiff's title.<sup>6</sup> This question was thus considered and determined at an early day in New York: "Our statute directs that the party applying for partition shall set forth the *rights* and *titles* of the parties; and this, it has been contended, imposes on the party applying for partition to set forth the right and title *at large* of all the parties to the suit. This statute must receive its construction from the terms in which it is conceived, expounded by the ordinary use to which those terms, in legal phraseology, are applied. If that application has been uniform and durable, it will certainly aid in ascertaining the intent of the statute.

"In an action for an *annuity*, it is not necessary to set forth the title and estate of the grantor, but only that he did grant it. In *replevin*, a defendant may *avow*, as tenant to

<sup>1</sup> *Maxwell v. Maxwell*, 8 Ired. Eq. 29.

<sup>2</sup> *Biddle v. Starr*, 9 Penn. St. 465.

<sup>3</sup> 2 *Estee's Pl.* 318; 2 *Van Santvoord's Pl.* 234.

<sup>4</sup> *Jenkins v. Van Schaak*, 8 Pai. Ch. 245. See also *Lucet v. Beekman*, 2 Cai. 385.

<sup>5</sup> *Sellon's Pr.* 217; *Allnatt on Partition*, 68; *Yate v. Whindnam*, Cro. Eliz. 64.

<sup>6</sup> *Rutherford v. Jones*, 14 Geo. 521.

*J. S., who was seised.* A *feoffee* may plead that A. was seised, and did enfeoff him. In *ejectment*, seisin and descent cast are *prima facie* evidence of right. In an action for a *rent charge*, the form of deducing the defendant's privity is, that the premises on which the rent was reserved came to his hands *by assignment*, without showing how; and in *ejectment*, the proof that the defendant holds under the same title with the lessor entitles him to commence his deduction from the common source.

“When *partition* could only be had by *coparceners*, they were *conusant* of each other's right; and thus *privity* attached with and constituted an essential part of their estate. It is not so with tenants in common. They have a unity of interest, but may have totally different titles. All that the petitioners were bound to maintain, as to the defendants, was that they held with him, as tenants in common, the proportion of the estate described in their petition. In analogous cases, it does not require that the title should be spread on the record. The words of the statute may as well be satisfied by alleging the seisin of all the parties, of their different portions simply, which constitutes their title, as if it were traced from the State or the Crown. It would be surcharging the record with useless matter, and impose on the plaintiff in partition in all cases a hazardous, and, in many cases, an impracticable task to compel him to set forth his title beyond his own seisin, as he must do it correctly, or fail in sustaining his action. The general allegation of seisin, I therefore think, was well enough.”<sup>1</sup>

§ 487. **The Description.**—The allegation in the declaration that the parties “hold together and undivided” is followed by a description of the property which they so hold and of which partition is demanded. This description must be indispensable, under all statutes,<sup>2</sup> for otherwise the Court could not know of what subject-matter it was exercising jurisdiction, nor could the defendants ascertain what interest they were called upon to assert. But some difference of opinion exists in regard to the degree of particularity or pre-

<sup>1</sup> *Bradshaw v. Callaghan*, 8 Johns. 562.

<sup>2</sup> *Hanner v. Silver*, 2 Oregon, 339.

cision with which the description must be set forth. In one case, it is said, "all that would seem to be required is, that such a general description be given as will lead to the identification of the property upon which the decree is intended to operate."<sup>1</sup> In another instance, the Court thought that all which should be required is such a description as will be intelligible to the parties interested.<sup>2</sup> But we think the better opinion is that the description should be so perfect as of itself to enable a competent surveyor to locate the premises to be divided.<sup>3</sup> It has been held that while the description in a deed may be made certain by evidence *aliunde*, the description in a petition for partition ought to be so definite as to need no such evidence to make it intelligible.<sup>4</sup>

§ 488. **The Moieties of the respective Parties.**—The declaration, after describing the property, proceeded to designate the respective interests of the plaintiff and defendant. This is also essential, under the various statutes, for unless the moiety of each cotenant be stated, the portion to be allotted to each cannot be ascertained, nor can the Court know that all the necessary parties are made defendants. A complaint in partition forms an exception to the general rule of pleading, that the plaintiff need not attempt to show the defendant's title or grounds of defence; and, perhaps out of deference to the general rule, the opinion has been expressed that the plaintiff need not allege of what moieties the respective defendants are seized.<sup>5</sup> But the authorities preponderate very decidedly against this opinion, and in favor of the rule that the plaintiff must state what interests the defendants have as between one another, or must excuse himself from making such statement, by showing that he has not the knowledge necessary to enable him so to do.<sup>6</sup> A petition for partition is demurrable if it shows that the petitioner owns

<sup>1</sup> *Thurston v. Minke*, 32 Md. 574.

<sup>2</sup> *Sewall v. Ridlon*, 5 Greenl. 460; *Wright v. McCormick*, 67 N. C. 27.

<sup>3</sup> *Swanton v. Crooker*, 52 Me. 416.

<sup>4</sup> *Miller v. Miller*, 16 Pick. 216.

<sup>5</sup> *Champion v. Spencer*, 1 Root, 147.

<sup>6</sup> *Van Cortlandt v. Beekman*, 6 Pai. Oh. 495; *Ramsay v. Bell*, 3 Ired. Ch. 209; *Hanner v. Silver*, 2 Oregon, 839; *Morenhout v. Higuera*, 32 Cal. 294; *Millington v. Millington*, 7 Mo. 446; *Senter v. DeBernal*, 38 Cal. 642.



one-fifth, and the defendant three-fifths, but neither states to whom the remaining fifth belongs, nor that its ownership is to plaintiff unknown.<sup>1</sup> Whatever difference of opinion may exist in regard to the propriety of requiring the plaintiff to show what moiety each of the defendants holds, nothing proceeding from the Courts has ever encouraged the idea that anything can excuse the plaintiff from alleging that he holds some distinctly specified moiety. He must aver, in addition to the fact that he holds together and undivided with the defendants, what it is that he will be entitled to have set apart to him in making the partition. He cannot proceed upon the theory that the extent of his interest is unknown to himself.<sup>2</sup>

§ 489. **Variance between Complaint and Proofs.**—Having alleged that he is seized of a specific moiety, the plaintiff may recover for that or for a smaller moiety, as he may be shown to be entitled. “If there be a variance between the petition and proofs, as to the quantity of interest which any of the tenants in common have in the lands whereof partition is sought, this can be set right by the Court, to whom it is referred to ascertain and determine the respective rights of the parties.”<sup>3</sup> “Although the interest of the parties may not be correctly described in the petition, it is competent for the Court in which the trial is had to amend the record and give judgment that partition may be made according to the respective rights of the parties.”<sup>4</sup> But the rule as understood by Mr. Allnatt is very different. He says: “The judgment must be conformable to the demand, for if A. brings partition, and thereby demands the fourth part, and the jury find that the cotenants hold *pro indiviso*, but that A. ought to have only a fifth part, A. shall not have that which is due to him, viz., the fifth part which he has a right to, for then the judgment will be variant from the demand.”<sup>5</sup>

<sup>1</sup> Rogers v. Miller, 48 Mo. 379.

<sup>2</sup> Savery v. Taylor, 102 Mass. 510; Champion v. Spencer, 1 Root, 147; Tibbs v. Allen, 27 Ill. 128.

<sup>3</sup> Ferris v. Smith, 17 Johns. 223.

<sup>4</sup> Thompson v. Wheeler, 15 Wend. 342.

<sup>5</sup> Allnatt on Partition, 75, citing Becket v. Bromley, Noy. 107.

§ 490. **Allegation of Demand.**—The form of a declaration at law<sup>1</sup> and of a bill in Chancery,<sup>2</sup> as given by eminent writers, both contain an allegation to the effect that the applicant has demanded that partition be made, and that the defendants have refused to consent thereto. The same allegation is to be found in some of the works on pleading prepared under the Code of Procedure of New York.<sup>3</sup> But as we know of no decision at law or in equity, nor of any statutory provision, requiring these facts to exist as a prerequisite to a compulsory partition, we doubt not that the allegation in regard to their existence is mere surplusage.<sup>4</sup> Such, we infer, must have been the opinion of the Supreme Court in New York, when it ordered an allegation in an answer, that the plaintiff had unreasonably refused to make partition by deed, to be stricken out as irrelevant and frivolous.<sup>5</sup>

§ 491. **Allegation of necessity of Sale.**—In Tennessee, it has been held that a sale of the property cannot be ordered unless the complaint contain an allegation of those facts which the statute prescribes as necessary to authorize such sale.<sup>6</sup> But in California, it has been said “that the manner in which the partition is to be made constitutes no part of the cause of action, but is merely a part of the relief. While it is proper and perhaps advisable to ask for a particular mode of partition—there being two provided by statute—and to that end allege the facts upon which the plaintiff relies for the particular mode which he seeks, yet this is not indispensable, and a complaint which is silent upon the subject is good.”<sup>7</sup> It was further decided, in the same case, that, conceding that the complaint ought to state the facts upon which a sale rather than a division of the property will be claimed, still nothing further need be alleged than “that the premises cannot be divided by metes and bounds without prejudice.” “Whether a partition can or cannot be made by metes and bounds is purely a question

<sup>1</sup> 2 Sellon's Pr. 216-7; 3 Chitty Pl. 1391.

<sup>2</sup> 3 Danl. Ch. Pr. 4th ed. 2027.

<sup>3</sup> 2 Van Santvoord's Pl. 234.

<sup>4</sup> See secs. 424, 425, 433.

<sup>5</sup> McGowan v. Morrow, 3 Code R. 9.

<sup>6</sup> Ross v. Ramsey, 3 Head, 16.

<sup>7</sup> DeUprey v. DeUprey, 27 Cal. 331.

of fact, and is the ultimate fact to be found, and therefore the only fact necessary to be averred under any system of pleading with which we are acquainted. The constituent facts, or those which lie behind, are merely probative, and need not be averred."<sup>1</sup> It is not necessary to show in the complaint when the right to partition accrued. The statutes of limitation have no application to suits for partition.<sup>2</sup>

<sup>1</sup> *DeUprey v. DeUprey*, 27 Cal. 331. The following form of complaint contains all the material averments necessary to sustain the applicant's demand for partition, in California and New York, and in other States having similar statutes.

The plaintiff alleges:

I. That he and the defendants C. and D. hold and are in possession, as tenants in common, of [here describe the property.]

II. That the plaintiff has an estate therein, consisting of [here state what the plaintiff's moiety is, and whether it is of an estate of inheritance, or for life, or for years.]

III. That each of the defendants, C. and D., has an estate in said property, consisting of [here state the interest of each of these defendants.]

Wherefore, plaintiff prays that said property may be partitioned among the parties hereto, according to their respective interests therein; or, in case such partition cannot be made without great prejudice to said parties, that said property be sold, and the proceeds divided among them, according to their respective rights.

X. Y., *Attorney for Plaintiff.*

If any of the parties in interest be unknown, or the share of any of the parties be unknown, uncertain, or contingent, this fact must also be stated. According to Mr. Van Santvoord: "It is always advisable to set forth, as far as can be ascertained, the titles and interests of unknown owners; but it has been held that an averment that there are 'certain unknown owners,' without setting forth their exact interest in the premises, is sufficient."—2 Van Santvoord's Eq. Pr. 2d ed. 465, citing *Hyatt v. Pngaley*. 28 Barb. 303.

When a lienholder is made defendant, the nature of his claim should be specially stated, (*Styker v. Lynch*, 11 N. Y. Leg. Obs. 116,) as:

That the defendant E. is the owner and holder of a mortgage, executed on the — day of — by the defendant O upon his interest in said property, to secure the payment of a certain promissory note, etc. [here stating the substance of the note]; or,

That the defendant F. holds a judgment recovered by him, duly given and entered in the — Court, on the — day of —, against the defendant D. for the sum of —, and docketed on the — day of —, in said county of —, which judgment remains unpaid and unsatisfied.

For statutory provisions in regard to complaints in partition, see Rev. Code, Ala., sec. 3106; Gould's Ark. Dig., p. 811, sec. 2; O. C. P. of Cal., sec. 753; Genl. Laws Del., 528, sec. 8; Bush's Dig. of Fla., 616, sec. 2; Code of Geo., sec. 3996; Groes' St. of Ill., 460, sec. 2; Code of Iowa, sec. 3278; C. P. of Kans., secs. 614-5; Rev. St. Me., 694, sec. 2; 2 Comp. Laws Mich., sec. 6269; Genl. St. of Mass., 699, sec. 6; Bissell's St. of Minn., 888, sec. 8; Rev. Code Miss., sec. 1816; Genl. St. of Mo., 611, sec. 3; O. P. of Neb., secs. 802-3; Comp. Laws Nev., sec. 1328; Genl. St. of N. H., 463, secs. 2, 3; 3 Rev. St. N. Y., 604, secs. 8, 10; Swan's St. of Ohio, 591, sec. 2; Deady's Laws of Oregon, 255, sec. 420; Thompson & Steger's St. Tenn., secs. 3270, 3272; Genl. St. Vt., 353, sec. 2; Taylor's St. Wis., 1679, sec. 4.

<sup>2</sup> *Jenkins v. Dalton*, 27 Ind. 78.

§ 492. **The Replication.**—In addition to his complaint or bill for partition, the applicant is, in many of the States, entitled to file a replication denying such allegations in the answer as he may choose to controvert.

§ 493. **The service of process is so exclusively a matter of statutory regulation in the several States that we shall not undertake to treat of it in this work.** This is equally true whether the defendant on whom process is to be served is an adult not under any disability, or is a *feme covert*, an infant, or a lunatic, or an unknown owner of whose age and condition nothing can be ascertained. In the case of unknown and non-resident owners, the summons is generally, if not universally, served by publication in some newspaper in pursuance of an order of the Court. To obtain this order, an affidavit must be made and filed showing that some of the owners are unknown, or are non-residents of the State, or cannot be found therein.<sup>1</sup>

§ 494. **If the defendants fail to answer the complaint or petition within the time prescribed by law for them to do so, their defaults may be entered.**<sup>2</sup> In New York, no judgment can be rendered in favor of plaintiff upon such default until he has introduced such proof of his title as, if unexplained, would entitle him to recover in ejectment.<sup>3</sup> The same rule seems to prevail in Nebraska, but is there held not to apply to cases in which the defendant appears by filing a demurrer which is overruled.<sup>4</sup>

<sup>1</sup> For provisions in regard to notice of application for partition, see: Rev. Code, Ala., sec. 3107; Gould's Ark. Dig., 811, secs. 5-8; O. C. P. of Cal., secs. 756-7; Bush's Dig. Fla., 617, sec. 8; Code of Geo., sec. 3998; Gross' St. of Ill., 470, sec. 6; Rev. St. Mo., 694, sec. 8; 2 Stanton's St. of Ky., 101, sec. 2; 2 Comp. Laws Mich., secs. 6275, 6276; Genl. St. Mass., 699, secs. 8-12; Rev. Code Miss., sec. 1817; Genl. St. of Mis., 612, secs. 6-7; Comp. Laws Nev., secs. 1330-32; Genl. St. N. H., 463, secs. 4-8; 3 Rev. St. N. Y. 604, secs. 14-18; Swan's St. of Ohio, 591, sec. 3; Deady's Laws of Oregon, 255, secs. 422-3; Brightly's Purdon's Dig., 1113, secs. 5, 6, 7, 12, 13, 14; Genl. St. R. I., 519, secs. 7-9; Rev. St. S. C. 530, sec. 5; Thompson & Steger's St. Tenn. secs. 3273-5; Genl. St. Vt., sec. 363; Taylor's St. Wis., 1680, sec. 10.

<sup>2</sup> Neilson v. Cox, 1 Cai. 121.

<sup>3</sup> Griggs v. Peckham, 3 Wend. 496; Jennings v. Jennings, 2 Abb. Pr. 6; Larkin v. Mann, 2 Pai. 27; Wilde v. Jenkins, 4 Pai. 491; Hamilton v. Morris, 7 Pai. 39; Porter v. Lee, 6 How. Pr. 491; Ripple v. Gilborn, 8 How. Pr. 456.

<sup>4</sup> Mills v. Miller, 2 Neb. 314. For proceedings in default, see: Gould's Dig. Ark., 812, secs. 13-14; Bush's Dig. Fla. 617, sec. 4; 2 Comp. Laws Mich., sec. 6284; Genl. St. Mis. 612, sec. 11; Genl. St. N. H. 464, sec. 10; Taylor's St. Wis., 1682, sec. 19.

## CHAPTER XXIV.

### DEFENCES AND THEIR PRESENTATION.

The Defendant's Pleadings, § 495.

Pleas in Abatement, § 496.

The General Issue, § 497.

Defences allowed in the United States, § 498.

Stating the Defendant's Title and Equities, 499.

Intervening, § 500.

Defences necessitating a reference to Legal Tribunals, § 501.

Disputed Title, § 502.

Disputed Title—States where it may be determined in the Partition Suit, § 503.

Answers and Cross-bills, § 504.

§ 495. **Defendant's Pleadings.**—In the States of California and New York, and probably in most of the other States where statutory provisions have not directed to the contrary, the proceedings and pleadings on the part of the defendant in partition correspond with those in other actions.<sup>1</sup> If the complaint insufficiently states the origin, nature, or extent of the plaintiff's interest, the defendant may demur.<sup>2</sup> No doubt he may also successfully interpose a demurrer whenever the complaint fails to show the existence of any fact without which the plaintiff is not entitled to the relief sought. In Indiana, it has been held that uncertainty in the description of the premises to be divided is not a ground for demurrer. The reasons given for this decision are that "the uncertainty in the description cannot be regarded in the same light as the omission of a fact necessary to be stated in order to constitute a cause of action. The uncertainty in the description

<sup>1</sup> Reed v. Child, 4 How. Pr. 125; Jennings v. Jennings, 2 Abb. Pr. 14.

<sup>2</sup> Broad v. Broad, 40 Cal. 495.

might have been obviated by a motion to require the pleading to be made definite and certain by amendment."<sup>1</sup>

§ 496. **Pleas in Abatement.**—The statute 8 and 9 Wm. III., for the easier obtaining partitions of lands, enacted "that no plea in abatement shall be admitted or received in any suit for partition, nor shall the same be abated by reason of the death of any tenant." In the United States, pleas in abatement are generally received. But the suit, as a general rule, does not abate on the death of any of the parties, whether plaintiff or defendant. The heirs or other successors to the interest of such deceased person may be brought into Court and bound by the partition.<sup>2</sup>

§ 497. **The General Issue.**—The plea of *non tenent insimul* constituted the general issue in actions of partition at common law.<sup>3</sup> Every allowable plea which could be interposed amounted to *non tenent insimul*.<sup>4</sup> This plea put in issue all the material allegations of the complaint, and seems to have been so adequate as to authorize the defendant to place in evidence every conceivable fact which, if proved, would prevent the plaintiff's recovery.<sup>5</sup>

<sup>1</sup> *Godfrey v. Godfrey*, 17 Ind. 8. See also 2 Van Sanvoort Eq. Pr. 18. In regard to defendant's pleadings, see Gould's Ark. Dig., 812, sec. 10; C. C. P. of Cal., sec. 758; Code Geo., sec. 4001; Code Iowa, sec. 3282; C. P. of Kans., sec. 617; Rev. St. Me., 694, sec. 5; Genl. St. Mass., 699, sec. 16; C. P. of Neb., sec. 806; Comp. Laws Nev., sec. 1333; Genl. St. N. H., 464, sec. 9; 3 Rev. St. N. Y., 606, sec. 20; Genl. St. R. I., 521, sec. 14; Genl. St. Vt. 354, sec. 5; Taylor's St. Wis., 1681, sec. 16.

<sup>2</sup> *Frohoch v. Gustine*, 8 Watts, 123; *Requa v. Holmes*, 16 N. Y. 195; *Osgood v. Taggard*, 18 N. H. 319. But where the statute of 8 and 9 Wm. III., or some similar statute, has not been adopted, a suit in partition abates on the death of one of the parties. *Thomas v. Smith*, 2 Mass. 479.

<sup>3</sup> The following is the plea of *non tenent insimul*, as shown in Tillinghast's Forms, p. 625: "And the said C. D., by G. H. his attorney, comes and says that he did not hold the premises in said petition of the said A. B. set forth, together with the said A. B. at the time of the commencement of the proceedings in this cause, as alleged in said petition of the said A. B.; and of this he the said C. D. puts himself upon the country: And the said A. B. doth the like, etc. G. H., Attorney for Defendant C. D." In *Hunt v. Hazleton*, 5 N. H. 219, it is said that the general issue in partition is "that the respondents do not hold, nor on the day of the exhibition of the petition in this behalf, nor ever afterwards did hold the said premises, nor any part or parcel thereof, together and undivided with the petitioner, as he, in his said petition, has supposed." But this is not now a sufficient plea in New Hampshire. See *Morrill v. Foster*, 5 Foster, 334.

<sup>4</sup> 2 Sellon's Pr. 218.

<sup>5</sup> *Bethell v. Lloyd*, 1 Dall. 2; *McKee v. Straub*, 2 Binn. 3; *Bates v. McCrory*, 3 Yeates, 192.

§ 498. In the United States, it is generally understood that the defendant may plead any plea, including pleas in abatement, which affords him any defence to the plaintiff's petition, and which show either that the plaintiff ought to have no relief whatever, or that his relief ought to be different from that which he claims in his petition. The answer of the defendants may be confined wholly to showing that the plaintiff is not entitled to relief. If so, it must of course take issue with one or more of those allegations which we have shown to be essential to every complaint in partition. It must either deny that the plaintiff is in possession, or that the parties are cotenants, or that the property to be divided is subject to compulsory partition. If no issue be taken on some of the indispensable allegations of the complaint, then some other matter must be affirmatively stated, as that the plaintiff has no legal capacity to sue, or that there is another action pending between the same parties for the partition of the same property.<sup>1</sup> "Any party appearing may plead either separately or jointly with one or more of his codefendants, that the plaintiffs, or any of them, were not in possession of the premises in question, or any part thereof; or that the defendants, or any of them, did not hold the premises together with the plaintiffs at the time of the commencement of the suit, as alleged in the petition; and other and further pleadings may also be had between the parties respectively, according to the practice of the Court as in personal actions, until an issue or issues, in law or in fact, be joined between the parties, or some of them."<sup>2</sup>

§ 499. Setting out Defendant's Title and Equities.—In the great majority of the cases in which a partition is sought, the right of the plaintiff to some relief is not denied, and the defendants are more interested in setting forth their own pretensions than in combatting the complainant's demand for a division. When the defendants have an interest in the property as cotenants, it is incumbent on them, by their answer, to disclose the nature and extent of such interest as fully as the plaintiff, in his complaint, is required to disclose

<sup>1</sup> *Hornfager v. Hornfager*, 6 How. Pr. 279; *Martindale v. Alexander*, 26 Ind. 105.

<sup>2</sup> 2 *Van Santvoord's Eq. Pr.* 25.



the nature and extent of his interest. They become, as it were, plaintiffs seeking affirmative relief, and bound, by all the rules of pleading, to exhibit the facts upon which alone that relief can be properly extended. "An action for partition," said the Supreme Court of California, "under our statute, is *sui generis*. The parties named in the complaint, whether as plaintiffs or defendants, are all actors, each representing his own interest. Whether plaintiffs or defendants, they are required to set forth fully and particularly the origin, nature, and extent of their respective interests in the property. This having been done, the interests of each, or all, may be put in issue by the others; and, if so, such issues are to be first tried and determined, and no partition can be made until the respective interests of all the parties have been ascertained and settled by a trial."<sup>1</sup> The parties may have no disagreement in regard to their respective moieties, and yet various facts may exist which, if properly brought to the attention of the Court, may influence the final determination of the suit. Some of the parties may have taken possession of some part of the property and enhanced its value by permanent or other valuable improvements, or may be the grantees of an interest in some specified parcel of the common lands. Facts like these, upon which claim for special relief may be predicated, ought to be alleged by the party desiring to secure the advantages to which they justly entitle him.

§ 500. **Persons not named as defendants may appear and ask leave to protect their interests.** When allowed by law or by order of the Court to participate in the suit as parties thereto, they are, no doubt, under the same obligation as the original parties to clearly present their claims; and when they have participated in the suit, they are not less bound by the judgment than any other actor in the litigation.<sup>2</sup>

§ 501. **Defences necessitating a reference to Legal Tribunals.**—The defendant's answer may show that he is in the

<sup>1</sup> *Morenhout v. Higuera*, 32 Cal. 295.

<sup>2</sup> *Field v. Unknown*, 34 Me. 35; *Huntress v. Tiney*, 46 Me. 83.



sole possession of the property, holding the same adversely to the plaintiff. If this allegation be established, the plaintiff will generally be required to proceed by an action at law to regain possession of the property, and thereby to put himself in a situation to compel a partition.<sup>1</sup> In such a case, if the suit be in equity, the general practice is to retain the bill and afford the complainant a reasonable time in which to prosecute his suit at law, to be let into possession. In equity, by bringing all parties in interest before the Court and obliging them to join in the requisite conveyances, it was possible to secure a partition which would be of perpetual obligation. But the jurisdiction of courts of equity, when proceeding in partition was likely to be superseded by controversies in regard to title which these courts were not authorized to decide. Whenever a dispute arose in reference to an equitable title, or whenever any matter was presented as a ground for equitable relief, these courts were exclusively authorized to determine it, and to afford an adequate redress. A dispute of this nature, instead of ousting or superseding the jurisdiction of a court of equity over a suit in partition, furnished an additional as well as an unanswerable argument in favor of the exercise of such jurisdiction.<sup>2</sup> But when an issue was formed in equity, to the determination of which an adjudication of questions of law was necessary, such issue was referred to some common law court, as will be apparent from decisions cited in the next section.

§ 502. **Disputed Title.**—It is certain that courts of equity, in assuming jurisdiction of the subject of partition, always disclaimed the authority to determine doubtful questions in regard to the legal title. There is a material difference between a doubtful and a disputed title; and the question very naturally arises, whether the mere fact that the defendant disputes the complainant's title is sufficient to oust Chancery of its jurisdiction? A large number of cases exist in which

<sup>1</sup> *Byers v. Danley*, 27 Ark. 77; *Trayner v. Brooks*, 4 Hayw. 295; *Lambert v. Blumenthal*, 26 Mo. 471. See secs. 439, 447.

<sup>2</sup> *Coxe v. Smith*, 4 Johns. Ch. 276; *Overton's Heirs v. Woolfolk*, 6 Dana, 375; *Obert v. Obert*, 2 Stock. Ch. 101; *Sterrick v. Dickinson*, 9 Barb. 521; *Foust v. Moorman*, 2 Carter, 20; *Carter v. Taylor*, 3 Head, 35; *Lamb v. Burbank*, 1 Saw. C. C. 227. See sec. 439.

no attention whatever is given to this distinction, and the broad proposition is asserted that whenever the complainant's title is disputed or suspicious, equity will not proceed with the partition until the dispute has been settled at law.<sup>1</sup> But in a few cases in which the distinction between a disputed and a suspicious title has suggested itself to the Court, the conclusion has been reached that the bare denial of complainant's title did not necessitate a reference to the legal tribunals; that equity had jurisdiction to determine whether the title was free from suspicion, and would, notwithstanding the defendant's objections, proceed whenever, in its judgment, the title was clear. "I do not understand, however, that the bare denial of the complainant's title is any obstacle to the Court's proceeding. The defendant must answer the bill, and if he sets up a title adverse to the complainant, or disputes the complainant's title, he must discover his own title, or show wherein the complainant's title is defective. If, when the titles are spread before the Court upon the pleadings, the Court can see that there is no valid legal objection to the complainant's title, there is no reason why the Court should not proceed to order the partition."<sup>2</sup> "If a bare denial of the title, when there was no reasonable doubt or suspicion attending it, would authorize the dismissal of the complainant's bill, it would place this equitable jurisdiction, which has been established by a long train of decisions, and is deemed of much public convenience, at the mercy of every profligate or unconscientious defendant, and render the Court the mere ministerial agent to carry into effect the wishes of parties in cases where there were no matters of controversy between them."<sup>3</sup> Whether the view here given be sustained or not, this much is certain, whenever a court of equity determined that there were any *serious* doubts in regard to the legal title, it would not proceed until those

<sup>1</sup> *Slade v. Barlow*, L. R. 7 Eq. 296; S. C. 38 L. J. R. (N. S.) Ch. 369; *Maxwell v. Maxwell*, 8 Ired. Eq. 28; *Butler v. King*, 2 Yer. 122; *Bolton v. Bolton*, L. R. 7 Eq. 298; *Potter v. Waller*, 2 DeG. & Sm. 410; *Daniel v. Green*, 42 Ill. 473; *Whillock v. Hale's Heirs*, 10 Humph. 64; *Wilkin v. Wilkin*, 1 John. Ch. 117; *Hoffman v. Beard*, 22 Mich. 59; *Hassam v. Day*, 39 Miss. 395; *Groves v. Groves*, 3 Sneed, 188; *Van Riper v. Berdan*, 2 Green, 132; *Currin v. Sprauell*, 10 Gratt. 147.

<sup>2</sup> *Lucas v. King*, 2 Stock. Ch. 280.

<sup>3</sup> *Overton's Heirs v. Woolfolk*, 6 Dana, 374.

doubts were judicially determined and removed.<sup>1</sup> Instead of at once dismissing the bill for partition, it was retained for a reasonable time, with liberty to the plaintiff to bring "such action as he might be advised" to establish his title.<sup>2</sup> "The rule of equity jurisdiction is well settled, that the Court will not interfere unless the complainant's title be clear, and will never grant the relief when the title is denied or suspicious until the party seeking relief has established his title at law."<sup>3</sup> But when the complainant was in possession as the sole owner of a life estate, and the tenancy in common was in the reversion only, and he could therefore sustain no action for the purpose of establishing his title, he was allowed to proceed at equity.<sup>4</sup> If during the progress of an action at equity for partition a question of law arises, the Court may, by consent of the parties, determine the question without referring it to any common law court for trial.<sup>5</sup> Where the title of the complainant was clear, but the defendants set up conflicting titles between themselves, the Court directed that the plaintiff's moiety be set off to him, and that the partition between the defendants be respited until they had settled their titles at law.<sup>6</sup>

§ 503. States where questions of Title may be Determined.—In several of the States, the Courts having jurisdiction over partition are entrusted with more ample powers than those elsewhere exercised by Courts proceeding in conformity with the common and statute law of England. This is particularly the case in regard to disputes concerning the title.<sup>7</sup> Such disputes may, in the States referred to, be tried and conclusively determined, and no necessity exists for referring any of the issues to some other tribunal for

<sup>1</sup> *Obert v. Obert*, 2 Stock. Ch. 100; *Deery v. McClintock*, 81 Wis. 201; *Nicely v. Boyles*, 4 Humph. 177; *Garrett v. White*, 8 Ired. Eq. 135; *Hay v. Estell*, 18 N. J. Eq. 252; *Bruton v. Rutland*, 3 Humph. 435.

<sup>2</sup> *Giffard v. Williams*, L. R. 5 Ch. Ap. 546; S. C. 39 L. J. R. (N. S.) Ch. 735; *Dewitt v. Ackerman*, 17 N. J. Eq. 215; *Riverview Cemetery Co. v. Turner*, 24 N. J. Eq. 18; *Manners v. Manners*, 1 Green. Ch. 385.

<sup>3</sup> *Shearer v. Winston*, 33 Miss. 150.

<sup>4</sup> *Allen v. Allen*, 2 Jones Eq. 237.

<sup>5</sup> *Burt v. Hellyar*, L. R. 14 Eq. 160.

<sup>6</sup> *Phelps v. Green*, 3 Johns. Ch. 306.

trial.<sup>1</sup> In California, where it was claimed that a judgment in partition could affect nothing beyond a mere division of the property, leaving the title as before the partition, the Court said: "The learned counsel for the appellant has filed a very able brief, which would be entitled to much weight in a jurisdiction where the distinctions between actions at law and suits in equity are still preserved; but unfortunately for the argument, the distinctions have been abolished in this State, and a party who here seeks relief at the hands of the Court may obtain both legal and equitable relief in the same action or proceeding, if upon the facts of his case he is entitled to both. If between the parties to an action for partition disputes exist as to their rights or interests in any respect, such disputes may be litigated and determined in such action."<sup>2</sup> In Wisconsin, under a system of practice similar to that of California, a conclusion has been reached in the Supreme Court directly antagonistic to that sustained by the quotation we have just made, as will fully appear by the following extract from an opinion written by Chief Justice Dixon of the first named State: "The only question which the Court is required to consider, or which it has considered and will determine, is, whether the mere legal title to land, the same being in good faith the subject of controversy and in doubt, may be tried and adjudicated in this form of action, it appearing that the objection was taken in the Court below, and is now renewed on appeal. It is not contended by counsel for plaintiff that the remedy in partition given by our statute is not an equitable proceeding. It is conceded to be such. It was by bill in Chancery before the enactment of the Code; and the same statutory provisions, with some slight and immaterial modifications or changes of name, still exist. The position of counsel, in short, is, that the blending of legal and equitable remedies, or the reduction of all, as near as may be, to a single form of action, under the Code, has abolished the rule which formerly prevailed, that the action for partition, being equitable, was not the proper

<sup>1</sup> *Godfrey v. Godfrey*, 17 Ind. 9; *Parker v. Kane*, 22 How. U. S. 13; *Wolcott v. Wighton*, 7 Ind. 46; *Forder v. Davis*, 38 Mo. 115; *Ormond v. Martin*, 1 Ala. Select Cas. 534; S. C. 37 Ala. 605; *Griffin v. Griffin, Jr.*, 33 Geo. 109; *Gross' St. of Ill.* 471, sec. 15.

<sup>2</sup> *Morehout v. Higuera*, 32 Cal. 298; *Bollo v. Navarro*, 33 Cal. 465.

one in which to try and determine a question of legal adverse title claimed. The contention is, that the action, though still equitable, has now become the proper one for the trial and adjudication of such an issue. A few considerations will, we think, suffice to show the error of this position, and that a court of equity is not now, any more than it formerly was, the proper forum in which to try and decide a question of mere legal title to land, and that the jurisdiction must still be refused. And first we observe, what all the adjudications since the enactment of the Code maintain, that although the distinction between actions at law and suits in equity, heretofore existing, are abolished, yet this only relates to the forms of actions, and does not touch or affect their inherent qualities and differences, which, from the nature of things, are unchanged and unchangeable. The change in the form of action has not changed the nature of the action itself. It has not enlarged the jurisdiction of equity nor abridged that of the law. This has been so often of late decided, and equitable interference refused on the ground that there vested an adequate remedy at law, that it seems unnecessary to remark upon it, especially in view of the provisions of the constitution of the State, under which it has been repeatedly held by this Court to be incompetent for the Legislature to take from the original or primary jurisdiction of equity and give to the law, or to do the reverse."<sup>1</sup> One circumstance controlling the decision in Wisconsin was not involved in the case in California. It was this, that the property in dispute was vacant lands, and that by statute either party could by law sustain ejectment against the other. Upon this point the Court said: "But the considerations of greatest weight in our minds, and which seem to us controlling, are the advantages which the defendant in partition may or must lose if compelled to submit to a trial of the legal title in this form of action, instead of the trial in ejectment as provided by law. Judgments in partition are, as declared by statute, and as has frequently been adjudged by this Court, binding and conclusive as to the title or interest of all persons, parties to the action, and their legal representatives, and all persons

<sup>1</sup> Deery v. McClintock, 81 Wis. 202.

claiming under them or either of them, except tenants, or persons having claims as tenants in dower, by the curtesy, or for life, to the whole of the premises which shall be subject to partition. But in the action of ejectment this is not so—at least not so as to the first judgment, which may always be vacated and a new trial had at the option of the defeated party. \* \* \* The judgment in such action rendered on the defendant's failure to answer, does not become conclusive upon him, or upon persons claiming from or through him by title accruing after the commencement of the action, until the expiration of two years from the time of docketing the same. The statute reserves other and further very important rights and privileges in this respect to any defendant who may be, at the time of docketing the judgment, either within the age of twenty-one years, or insane, or imprisoned on any criminal charge, or a married woman. All these rights and privileges accorded to the defeated party and defendant in an action of ejectment, and which must be conceded to be not unfrequently of great value to him, to say nothing of the advantage, often most material, of a new trial, sometimes granted for misdirection, or improper admission of testimony, or other error in action at law, would be wholly lost to the same party if required to litigate the same question or matter of controversy in a suit or proceeding in equity. These considerations seem conclusive to us upon the point, and to show that the jurisdiction of equity does not attach and ought not to be maintained in a case like the present.”<sup>1</sup>

§ 504. **Answers and Cross-bills.**—When the defendant wishes to assert any matter for the purpose of defeating the plaintiff's claim for partition, he should do so by his answer. When the matter is brought forward, not for the purpose of defeating the partition, but of obtaining some affirmative relief for the defendant—as when compensation for improvements is sought, or a conveyance of the legal title is desired—he should assert this affirmative matter by cross-bill.<sup>2</sup>

<sup>1</sup> *Deery v. McClintock*, 31 Wis. 202.

<sup>2</sup> *German v. Machin*, 6 Pal. Oh. 288; *Martindale v. Alexander*, 26 Ind. 105; *Stafford v. Nutt*, 35 Ind. 93.

## CHAPTER XXV.

### RELIEF GRANTED IN EQUITY, IN CONNECTION WITH PARTITIONS.

All Equities may be Considered and Adjusted, § 505.

Except those which do not arise out of the Common Property, § 506.

Granting Ovelty, § 507.

Making Partial Partition, § 508.

Awarding Cotenant his Improvements, § 509.

Compensating Cotenant for his Improvements, § 510.

States where Compensation is not allowed, § 511.

Compelling an Accounting, § 512.

Compelling Conveyance, § 513.

Injunction against Waste, § 514.

Injunction against Partition at Law, § 515.

§ 505. **All Equities may be Considered and Adjusted.**—When a suit for partition is in a court of equity, or in a court authorized to proceed with powers as ample as those exercised by courts of equity, it may be employed to adjust all the equities existing between the parties and arising out of their relation to the property to be divided. “He who seeks equity must do equity.” Hence whoever, by a suit for partition, invokes the jurisdiction of a court of equity in his behalf, thereby submits himself to the same jurisdiction, and concedes its authority to compel him to deal equitably with his cotenants.<sup>1</sup> As the equities of the cotenants may arise from a great variety of circumstances, it follows that the assertion of these equities necessarily introduces into partition suits a great variety of issues, and calls for various

<sup>1</sup> Story's Eq. Jur. sec. 656. “Though partition had its origin in the common law courts, it is a subject over which the courts of equity assume almost exclusive jurisdiction; and in disposing of the cases for partition, the equities of the respective parties growing out of their ownership of the property as tenants in common or otherwise are taken into consideration, and disposed of upon the broad principles which govern those courts in the administration of justice.”—Dall v. The Confidence Silver Mining Co. 3 Nev. 535.



allegations in the respective complaints and answers which would not be required in an ordinary suit for partition not complicated by any special equities between the cotenants. We shall not undertake to treat of these various pleadings, for the reason that they are not peculiar to suits in partition, and have been sufficiently considered in works on pleadings and practice in equity, but shall confine our attention to the enumeration and consideration of the principal matters which may be asserted by one cotenant in a suit for partition, whether so asserted for the purpose of securing equitable allotments or of adjusting other claims arising out of the cotenancy.

§ 506. **The Equities which may be adjusted and enforced in a suit for partition are such only as arise out of the relation of the parties to the common property.** But the fact that an equitable cause of action for which the court can grant no relief in a suit for partition is set up in the bill, is no ground for dismissing the suit. For independent of this fact, the plaintiff is entitled to some relief—to wit, to a partition.<sup>1</sup>

§ 507. **Owelty.**—When an equal partition cannot be otherwise made, courts of equity may order that a certain sum be paid by the party to whom the most valuable purparty has been assigned.<sup>2</sup> The sum thus directed to be paid to make the partition equal is called owelty. It seems to have been a lien on the purparty on account of which it was granted. “The law cannot contemplate the injustice of taking property from one person and giving it to another without an equivalent, or a sufficient security for it.”<sup>3</sup>

§ 508. **Partial Partition.**—A tract held in common cannot be partitioned by fragments. Hence the grantee under a deed from one of the cotenants purporting to convey by metes and bounds a part of the larger tract, cannot enforce

<sup>1</sup> Hoffman v. Ross, 25 Mich. 176.

<sup>2</sup> Smith v. Smith, 10 Pai. 477; Graydon v. Graydon, 1 McMullan's Eq. 63; Cox v. McMullan, 14 Gratt. 91; Bipsham's Equity, sec. 49; Allnatt on Partition, 89.

<sup>3</sup> Wynne v. Tunstall, 1 Dev. Eq. 28; Long v. Long, 1 Watts, 266; Darlington's Appropriation, 13 Pa. St. 432; Davis v. Norris, 8 Pa. St. 125.



a partition of the portion in which alone he has any interest.<sup>1</sup> The suit for partition should always embrace the whole tract held by the cotenancy. But while it is indispensable that the whole tract should be embraced in the suit for partition, it does not follow that those who are mutually desirous of continuing the relation of cotenancy between one another are obliged to have their several portions allotted to them to hold in severalty. It is true that, in a few cases, a partial partition has been treated as unauthorized and improper under all circumstances.<sup>2</sup> But the decided weight of the authorities is the other way. Two or more cotenants may unite in a petition for partition, and have their moieties set off to them, to be by them enjoyed together and undivided.<sup>3</sup> "The plaintiff in partition is entitled to have his share set off, if the premises are capable of being divided, for that is his object in instituting the proceedings; but if the situation of the defendants is such as to render it for their interest to retain their proportion together and undivided, there can be no possible objection, in principle, in permitting it to be done, nor is it incompatible with the spirit and intent of the act."<sup>4</sup>

§ 509. **Improvements.**—The fact that a cotenant has located upon a particular portion of the lands of the cotenancy and has enhanced its value by making improvements, or by reducing it from a wild state to one fit for profitable cultivation, is a circumstance always deemed worthy of the attention of a court charged with the duty of making a partition.<sup>5</sup> Such improvements are generally indispensable to a profitable and comfortable enjoyment of the property, and contribute to the general prosperity of the community. The law declines to compel one cotenant to pay for improvements

<sup>1</sup> *Bigelow v. Littlefield*, 52 Me. 25; *Sutter v. San Francisco*, 36 Cal. 116; *Hanson v. Willard*, 12 Me. 145; *Duncan v. Sylvester*, 16 Me. 391; *Miller v. Miller*, 13 Pick. 257; *Sweeny v. Meany*, 1 Miles, 167.

<sup>2</sup> *Robertson v. Robertson*, 2 Swan, 199; *Handy v. Leavitt*, 3 Edw. Ch. 229.

<sup>3</sup> *Upham v. Bradley*, 17 Me. 427; *Page v. Webster*, 8 Mich. 265; *Northrop v. Anderson*, 8 How. Pr. 351; *Shull v. Kennon*, 12 Ind. 35; *Allen v. Hoyt*, 5 Met. 326.

<sup>4</sup> *McWhorter v. Gibson*, 2 Wend. 445; *Hobson v. Sherwood*, 4 Beav. 185; *Abbott v. Berry*, 46 N. H. 369; *Murray v. Wooden*, 17 Wend. 540.

<sup>5</sup> *Hart's Devises v. Hawkins*, 3 Bibb. 510.

made without his authorization; but it will not, if it can avoid so inequitable a result, enable a cotenant to take advantage of the improvements for which he has contributed nothing. When the common lands come to be divided, an opportunity is offered to give the cotenant who has enhanced the value of a parcel of the premises the fruits of his expenditures and industry, by allotting to him the parcel so enhanced in value, or as much thereof as represents his share of the whole tract. "It is the duty of equity to cause these improvements to be assigned to their respective owners, (whose labor and money have been thus inseparably fixed on the land,) so far as can be done consistently with an equitable partition."<sup>1</sup>

§ 510. **Compensation for Improvements.**—When the equities accruing to a cotenant by virtue of improvements made by him can be fully recognized and protected by awarding him the portion of the land on which they are situated, no special embarrassment attends the partition, and there can be no possible doubt in regard to the action which a court of equity, or a court having authority similar to that exercised by courts of equity, will take. But when the property is not susceptible of such a division, the more doubtful question arises, whether compensation ought to be awarded to the cotenant who has made the improvements. Upon this question, we think the following extract from the opinion of a Supreme Court in the State of New York fairly expresses the result of a decided preponderance of the authorities, where the improvements have been made in good faith, and without any apparent desire to injure or oppress the other cotenants: "Where one tenant in common lays out money in improvements on the estate, although the money so paid does not, in strictness, constitute a lien on the estate, yet a court of equity will not grant a partition without first directing an account and a suitable compensation. To entitle the tenant in common to an allowance on a partition in

<sup>1</sup> Withers v. Thompson, 4 Monr. 335; Seale v. Soto, 35 Cal. 104; Drennen v. Walker, 21 Ark. 557; Louville v. Menard, 1 Gilm. 39; Brookfield v. Williams, 1 Green's Ch. 341; Crafts v. Crafts, 13 Gray, 360; Pope v. Whitehead, 63 N. C. 199; Biehn v. Biehn, 18 Grant's Ch. 497; Hovey v. Ferguson, 18 Grant's Ch. 498; Wood v. Wood, 16 Grant's Ch. 471.

equity, for the improvements made on the premises, it does not appear to be necessary for him to show the assent of his cotenants to such improvements, or a promise, on their part, to contribute their share of the expense; nor is it necessary for them to show a previous request to join in the improvements, and their refusal."<sup>1</sup> "The only good faith required in such improvements is that they should be made honestly for the purpose of improving the property, and not for embarrassing his cotenants or encumbering their estate, or hindering partition."<sup>2</sup> But "if one joint-tenant, or tenant in common, covers the whole of the estate with valuable improvements, so that it is impossible for his cotenant to obtain his share of the estate without including a part of the improvements so made, the tenant making the improvements would not be entitled to compensation therefor, notwithstanding they may have added greatly to the value of the land; because it would be the improver's own folly to extend his own improvements over the whole estate, and because it would be unjust to permit a cotenant, at his pleasure, to charge another cotenant with improvements he may not have desired. In such a case, the improver stands as a mere volunteer, and cannot, without the consent of his cotenant, lay the foundation for charging him with improvements."<sup>3</sup> As the allowance of compensation for improvements is, in all cases, made, not as a matter of legal right, but purely from the desire of the Court to *do justice*, the compensation will be estimated so as to inflict no injury on the cotenant against whom the improvements are charged. He will therefore be charged, not with the price of the improvements, but only with his proportion of the amount which at the time of the partition they add to the value of the premises.<sup>4</sup> From this amount he will also be entitled to deduct any sum to which

<sup>1</sup> Green v. Putnam, 1 Barb. 507; Martindale v. Alexander, 26 Ind. 105; St. Felix v. Rankin, 3 Edw. 323; Swan v. Swan, 8 Price, 518; Doughaday v. Crowell, 8 Stock. 204; Dean v. O'Meara, 47 Ill. 120; Kurtz v. Hibner, 55 Ill. 521; Respass v. Breckenridge, 2 A. K. Marsh. 584; Robinson v. McDonald, 11 Tex. 390; Hitchcock v. Skinner, Hoff. 28.

<sup>2</sup> Hall v. Piddock, 21 N. J. Eq. 314.

<sup>3</sup> Nelson's Heirs v. Clay's Heirs, 7 J. J. Marsh. 142.

<sup>4</sup> Moore v. Williamson, 10 Rich. Eq. 328.

he may have a just claim for use and occupation of his moiety enjoyed by the cotenant making the improvements.<sup>1</sup>

§ 511. **States where Compensation for Improvements is not allowed.**—The rule that a cotenant may, in partition, recover compensation for improvements made by him without the assent of his cotenants, does not universally prevail. In Alabama, the claim for improvements can be asserted only as a counter demand to a claim for rents.<sup>2</sup> In a comparatively recent case decided by the Commission of Appeals of the State of New York, language is used which tends very strongly to impair the authority of *Green v. Putnam*, referred to in the preceding section. In the case determined by the Commission of Appeals, a tenant in common of a reversion had, by an arrangement with the tenant of the life estate, erected buildings by which the value of the property was considerably enhanced. From these buildings he had before the death of the tenant for life received rents sufficient to repay him the original outlay, with interest thereon. In a subsequent action for partition, he claimed of his cotenants compensation for these improvements. For rejecting this claim, the following reasons, among others, were given: "There was no consent, mistake, or other equitable ground in this case for relieving a party who made his investment with full knowledge of the facts, voluntarily, and without any inducement offered by the other cotenants. Had the applicants offered to share their rents, upon being paid a due proportion of the value of the improvements after the termination of the life estate, it might have afforded a better ground to claim compensation. The appellants are not within the reason of any of the adjudged cases where relief has been granted in partition for money expended in improvements by one of several tenants in common. If the land has been really enhanced in value by the improvements, the appellants are in a better plight than strangers, as they will receive their *pro rata* share of the increased proceeds of the sale. The owner cannot be called upon to afford any in-

<sup>1</sup> *Teasdale v. Sanderson*, 33 Beav. 534; *Rowan v. Reed*, 19 Ill. 28.

<sup>2</sup> *Ormond v. Martin*, 37 Ala. 606; *Horton v. Sledge*, 29 Ala. 498.

demnity or compensation for money expended by a stranger for improvements, if he had full knowledge of the risk he was encountering when they were made."<sup>1</sup>

§ 512. **Accounting.**—A complainant may, by the same bill, procure a partition and an accounting;<sup>2</sup> and the defendant may also, by a cross-bill, compel the complainant to account with him. Claims for rents received, or for use and occupation of the common property, to the exclusion of the other cotenants, are very frequently enforced in suits for partition.<sup>3</sup> In New York, in a case in which the point did not require to be decided, it was held that "the rents and profits of the premises accruing while the land has been held adversely to the claim of the complainants, even if such rents and profits had been received by one who was a joint owner of the premises with the complainants, are not properly recoverable in this Court upon a bill for partition; or rather, they must be more properly recoverable as mesne profits, in an ejectment suit brought for the recovery of the possession of the part claimed by the complainants."<sup>4</sup> The opinion here expressed has not, so far as we can ascertain, met with any support; and it certainly does not deserve to meet with any. When equity has jurisdiction for partition, no obstacle exists to its proceeding to do complete justice, by compelling an account for *all* rents received; and nothing better than expense and delay can result from requiring one suit at law for mesne profits and another in equity for partition. "Where one tenant in common has made a parol agreement with another tenant in common for his interest in the land, and paid a part of the purchase money, which agreement fails by reason of the purchaser's refusing to comply on account of the agreement not being in writing, a court

<sup>1</sup> Scott v. Guernsey, 48 N. Y. 128.

<sup>2</sup> Obert v. Obert, 2 Stock. Ch. 98; Tuckfield v. Buller, 1 Dickens, 241; Wills v. Slade, 6 Ves. 498.

<sup>3</sup> Davidson v. Thompson, 22 N. J. Eq. 84; Goodenow v. Ewer, 16 Cal. 472; Hill v. Fulbrook, 1 Jac. 574; Lorimer v. Lorimer, 5 Madd. Ch. 363; Story v. Johnson, 1 Y. & C. Eq. Ex. 546; 2 Ib. 586; Humphrey v. Foster, 13 Gratt. 657; Allen v. Barkley, Speer Eq. 264; Howey v. Goings, 13 Ill. 107; Hawkins v. Taber, 47 Ill. 460; Pope v. Balsman, 35 Mo. 365.

<sup>4</sup> Burhans v. Burhans, 2 Barb. Ch. 410.

of equity, in decreeing a partition, may properly decree the purchase money so paid to be a lien on the premises."<sup>1</sup> So where, on the joint purchase of the common lands, one of the cotenants had paid more than his proportion of the price, he was held to be entitled to be indemnified, for the excess, out of the proceeds of the sale in partition.<sup>2</sup> A tenant in common who has removed an incumbrance from the common property is entitled to contribution from his cotenants. To secure such contribution, a court of equity, acting in a suit for partition, in favor of the cotenant removing the incumbrance, will enforce an equitable lien of the same character with that which he has removed.<sup>3</sup> In one case, the commissioners awarded damages for waste. Their report was excepted to, on the ground that the remedy for waste was at law; but the Court said: "There is hardly any question in relation to property which this Court may not determine incidentally, for the purpose of doing complete justice, and preventing multiplicity of litigation."<sup>4</sup> In decreeing partition of slaves, the Court required the plaintiff to reimburse the defendant for expenses incurred in a suit to recover the slaves from a third person.<sup>5</sup>

§ 513. **Compelling Conveyance.**—When the title of a cotenant is equitable merely, and he is entitled to a conveyance of the legal title, he may, by proper pleadings, assert his rights and obtain a decree of the Court "compelling those in whom the legal title rests to convey according to the partition awarded."<sup>6</sup> But where the sole purpose of the bill is to procure a partition, it will not be granted on the ground that the plaintiff is entitled to a conveyance. He must first, in the same or in an independent suit, obtain a decree declaring his right to the conveyance.<sup>7</sup>

<sup>1</sup> *Campbell v. Campbell*, 3 Stock. Ch. 276.

<sup>2</sup> *Warfield v. Banks*, 11 Gill & J. 98.

<sup>3</sup> *Titaworth v. Stout*, 49 Ill. 78.

<sup>4</sup> *Backler v. Farrow*, 2 Hill's Ch. 111.

<sup>5</sup> *M'Meekin v. Brummet*, 2 Hill's Ch. 643.

<sup>6</sup> *Overton's Heirs v. Woolfolk*, 6 Dana, 376; *Christian's Devisee v. Christian*, 6 Munf. 534; *Hunter v. Brown*, 7 B. Monr. 283.

<sup>7</sup> *Williams v. Wiggand*, 53 Ill. 233.

§ 514. An injunction may, in some instances,<sup>1</sup> be granted on the application of one cotenant to restrain another from committing or continuing some act destructive to the common estate. This relief may be obtained in a suit for partition<sup>2</sup> as well as in an independent proceeding.

§ 515. **Enjoining Partition at Law.**—In proceeding at law for a partition, no notice was taken of any equitable rights or titles. The land was divided into moieties, as directed by the judgment of the Court; and, in making such division, no attention was paid to the equitable rights of either of the cotenants, arising from the erection of improvements, or from any other cause.<sup>3</sup> When a court of law by proceeding with a partition is about to sacrifice the equitable rights of some of the cotenants, a court of equity will enjoin the proceedings at law and award an equitable partition. "A court of equity will not interfere, unless such interference becomes necessary to protect some party thereto from fraud or wrong, or to secure him some clear right which the law tribunal, from the manner of proceeding before it, cannot secure. For such purpose, courts of equity in exercising one of their principal functions, which is to remedy injustice occasioned by the strict rules of the law and the manner of proceeding in courts of law, will interfere to prevent a failure of justice and loss of rights."<sup>4</sup> A court of equity will therefore interfere where one of the cotenants has, in good faith, placed valuable improvements on the property.<sup>4</sup> Where by statute Chancery has power to decree a sale of lands, and no such authority exists at law, a proceeding at law for partition may be enjoined, if it appears that the partition at law will result in great injury to the parties in interest, and that a sale of the property will be much more beneficial to them than a division thereof.<sup>5</sup>

<sup>1</sup> See secs. 823-4.

<sup>2</sup> *Baily v. Hobson*, 22 L. T. R. 594; S. C. 2 Alb. L. J. 74. A receiver may also be appointed pending a partition. *Low v. Holmes*, 17 N. J. Eq. 150; *Rutherford v. Jones*, 14 Geo. 526.

<sup>3</sup> *Greenup v. Sewell*, 18 Ill. 54; *Thornton v. York Bank*, 45 Me. 164; *Tilton v. Palmer*, 31 Me. 487; *Liscomb v. Root*, 8 Pick. 377; *Baldwin v. Breed*, 16 Conn. 65; *Marshall v. Crebore*, 13 Met. 468; *Bull v. Nichols*, 15 Vt. 835.

<sup>4</sup> *Hall v. Piddock*, 21 N. J. Eq. 312.

<sup>5</sup> *Gash v. Ledbetter*, 6 Ired. Eq. 185.



## CHAPTER XXVI.

### THE JUDGMENTS, AND THE PROCEEDINGS THEREUNDER.

The First Judgment, § 516.

The First Judgment determines the Moieties, § 517.

The First Judgment, Special Directions in, § 518.

The First Judgment is not Final, § 519.

Issuing the Writ, § 520.

Issuing the Commission in Chancery, § 521.

The Commissioners and their Duties, § 522.

Report of the Commissioners, § 523.

Vacancies in the Commissioners, § 524.

Vacating Commissioner's Report for Error in Judgment, § 525.

Vacating Commissioner's Report for Error in Proceeding, § 526.

The Final Judgment in Decree, § 527.

§ 516. **The First Judgment.**—Whether the proceeding for partition was prosecuted at law or in equity, it was first necessary to decide whether the parties were cotenants and entitled to partition. This question being resolved in the affirmative, it was next necessary to determine the respective moieties of each of the parties. The result of the decision of these two questions was the judgment *quod partitio fiat*. This was the first or interlocutory judgment in partition. It directed that partition be made between the parties, and commanded the sheriff to go to the premises, and in the presence of the parties, if they be willing to be present, after being first forewarned, “by the oath of good and lawful men of his county, respect being had to the true value of the said tenements, with the appurtenances, he cause to be divided” into certain moieties which the judgment proceeded to specify, and that he deliver one moiety to A and another to B, etc.<sup>1</sup> In Chancery, the decree for partition ordered:

<sup>1</sup> 3 Chitty Pl. 1392; Booth on Real Actions. 244-5.



1st, that a partition be made between the plaintiffs and defendants, in certain moieties which it specified; 2d, that a commission or commissions issue to certain persons to be therein named; 3d, that the commissioners do make a partition, [here specifying the manner in which it shall be made]; 4th, that all writings, surveys, muniments of title, etc., be produced before the commissioners; 5th, that the commissioners examine witnesses, as they may think fit; 6th, that after such partition has been made, that the parties execute conveyances to each other respectively.<sup>1</sup> The decree, in addition to these directions, usually contained another in reference to the title deeds, and one in regard to costs.

§ 517. **First Judgment must determine the Moieties.**—Whether the proceeding was at law or in equity, the province of the Court was to determine between whom, and in what proportions, the division should be made. In no case could the commission determine title, or prosecute any inquiries in regard thereto.<sup>2</sup> In one case in equity, where it was conceded that the parties were cotenants and entitled to partition, but their respective moieties were uncertain, the Master of the Rolls said: “I shall take a little time to consider what is a proper decree in this case. At present, I am strongly inclined not to decree an immediate partition, upon the grounds that have been stated; but I wish to consider whether, as incidental to the demand for partition, the Court would not put into a train of inquiry what are the proportions in which they are interested in these lands, in order to lay a foundation for partition afterwards, that previous inquiry to be before the Master; whether the commission ought not, as the writ always does, to state the proportion in which the partition is to be made.” Subsequently, he announced the result of his consideration as follows: “There are two cases in which the Court referred it to the Master to ascertain the interests of the parties, and afterwards directed a commission to issue: *Calmady v. Calmady*,<sup>3</sup> and *Duncan v. Howell*. The uncertainty of the shares is not a ground for

<sup>1</sup> *Seaton's Forms*, 184; *Danl. Ch. Pr.* 4th ed. 2254.

<sup>2</sup> *Ham v. Ham*, 39 Me. 218.

<sup>3</sup> 2 Ves. Jr. 568.

definitely refusing a partition: it is for refusing it at present. It cannot be referred to the commissioners to ascertain the interests. This must be done, as in those cases by the Court, through the medium of the Master. In one of the cases, the form of the inquiry was, what undivided shares the several parties were entitled to, and for what estates and interests therein respectively."<sup>1</sup>

§ 518. **Special Directions.**—The respective duties of the Court and of its commissioners in making a partition are not very clearly defined. Although the first or interlocutory decree determines the moieties of the respective parties, and thereby furnishes the basis upon which the commissioners are to proceed, there are many things, in addition to the moieties of the parties, to be considered in making an equitable partition. Among these are the granting of owelty, the setting aside of improved lands to the tenant who improved them, and the allotment of wasted lands to the tenant who wasted them. No doubt the Court might insert in its interlocutory decree such special directions to the commissioners as it thought necessary to insure an equitable partition. But whether it was usual to insert such directions in the first decree, or to leave the whole matter to the judgment of the commissioners in the first instance, and to apply for the modification or rejection of their report when it proved unsatisfactory, are subjects of which the authorities coming within our view have failed to enlighten us.

§ 519. **First Judgment is not Final.**—Neither the interlocutory judgment at law nor the first decree in Chancery is final: it cannot, therefore, be corrected by a direct appeal.<sup>2</sup> The parties must wait until the entry of the final judgment or decree. In Texas, a different rule prevails. A decree which determines all the issues made by the pleadings, and directs partition to be made in accordance with such deter-

<sup>1</sup> *Agar v. Fairfax*, 17 Ves. 542; *Phelps v. Green*, 3 Johns. Ch. 304; *Ledbetter v. Gash*, 8 Ired. 463.

<sup>2</sup> *Ivory v. Delare*, 26 Mis. 505; *Beebe v. Griffing*, 6 N. Y. 465; *Clester v. Gibson*, 15 Ind. 10; *Griffin v. Griffin*, 10 Ind. 170; *Cook v. Knickerbocker*, 11 Ind. 230; *Hunter v. Miller*, 11 Ind. 356; *Pipkin v. Allen*, 29 Mo. 229; *Durham v. Durham*, 34 Mo. 447; *Medford v. Harrell*, 8 Hawks, 41.

mination, is regarded as final, because it leaves nothing to be done but to execute the directions therein contained.<sup>1</sup> It is obvious that if no appeal is permitted from the interlocutory judgment in partition, all the subsequent labor of the commissioners in making the allotment may be lost by a reversal for some error in fixing the interests of the parties. To avoid this result, an appeal from the interlocutory judgment is, in some of the States, authorized by statute.<sup>2</sup> Under these statutes, an error in the preliminary decree must be corrected by an appeal therefrom, or by a motion for a new trial;<sup>3</sup> because, "upon appeal from a final judgment, an order made in the cause which is itself by statute made the subject of a distinct appeal, cannot be reviewed."<sup>4</sup>

§ 520. **Issuing the Writ.**—In proceedings at law, after the entry of the first judgment in partition, the writ *de partitione facienda* was issued to the sheriff. By this writ he was commanded, with twelve good and lawful men of the neighborhood, to go to the manors and tenements, and there, in the presence of the parties, (who are to be forewarned,) if they be willing to be present, by the oath of said twelve men, respect being had to the true value of the property, to cause the same to be divided. The writ then proceeded, in accordance with the interlocutory judgment, to specify the moieties into which the property should be partitioned. After the partition was made, it was returned to the Court under the seals of the sheriff and the twelve jurors. This return certified that on a day named, the sheriff took with him twelve free and lawful men, (naming them,) and went on the manor, etc., and by the oath of said men, he caused to be divided the said manor, etc. The return here states the bounds of the several allotments, and to whom each allotment had been delivered and assigned. Upon this return, the *final* judgment of the Court is: "Therefore, it is considered that the aforesaid partition be holden firm and effectual forever."<sup>5</sup>

<sup>1</sup> McFarland v. Hall, 17 Tex. 676.

<sup>2</sup> Cal. C. O. P. sec. 939.

<sup>3</sup> Regan v. McMahon, 43 Cal. 627.

<sup>4</sup> McCourtney v. Fortune, 42 Cal. 387.

<sup>5</sup> 2 Sallon's Pr. 219-221; Chitty's Pl. 1394-1407.

§ 521. The commission issued in Chancery appointed certain persons as commissioners, and authorized them to meet at proper times and places, to enter upon, walk over, and survey the estate in question, and make a fair allotment thereof, and to distinguish such allotments by certain metes and bounds. The commission stated the names of the several persons entitled to allotments, and designated their respective interests. It authorized the summoning of witnesses and their examination upon oath, provided that their depositions should be reduced to writing, and concluded as follows: "And when ye have done and performed these things, ye shall certify and return the same into our Court of Chancery, without delay, wheresoever our said Court shall then be, the facts and proceedings in the premises, by your certificate fairly written on parchment, together with the said examinations and interrogatories, and also this writ closed up, under the seals of you, any three or two of you."<sup>1</sup> When the commissioners have performed their duties by making the necessary allotments, they must prepare their certificate, "which must detail their proceedings and appoint the shares of each party, according to their allotments, to be enjoyed by them in severalty, distinguishing each part, if so directed by the commission, by metes and bounds. There is no prescribed form of a certificate: it is in the nature of a report; and, as a rule, it should follow, as nearly as may be, the language of the commission; and the particulars, description, and quantities of the several parts of the estate, may be described in a schedule."<sup>2</sup> When the commission, with the accompanying documents, has been returned and filed, an order must be obtained confirming the certificate. The partition is next completed by conveyances executed in pursuance of the decree of partition, and the allotments made thereunder by the commissioners.

§ 522. Commissioners and their Duties.—In the United States, under the various statutes, the proceedings subsequent to the interlocutory judgment conform more nearly to

<sup>1</sup> Seaton's Forms, 190. See the opinion of Lord Redesdale upon the Commission of Partition in the case of *Curzon v. Lyster*, Seaton's Forms, 191.

<sup>2</sup> Danl. Ch. Pr. 4th ed. 1158.

the proceedings in Chancery than to those formerly had at law under the writ of partition. Immediately after entering this judgment, or at the same time by a provision in the judgment, the Court appoints a number of disinterested persons—usually three or five—to make the partition. They are commonly called commissioners, sometimes referees, and more rarely partitioners. They have no power to determine questions of title.<sup>1</sup> “When the interlocutory judgment is entered, it is a conclusive determination of the rights of all the parties to the proceedings; and no question any longer remains open concerning their ownership, or title, or their undivided shares and interests. The commissioners have no other duty to perform, or authority to act, than to divide the estate according to the directions contained in the warrant.”<sup>2</sup> The statutes usually require the commissioners to be sworn<sup>3</sup> before entering upon the discharge of their duties, and also to give notice to the parties interested of the time and place when and where they will make the partition. They are authorized to employ a surveyor when necessary, and are directed to divide the lands in such manner as to give each cotenant, as nearly as possible, his proportion in value.<sup>4</sup> In some of the States, the land is first divided by the commissioners into equal parts, and they then determine by lot to whom each part shall be assigned;<sup>5</sup> but more usually they are authorized to make the several allotments without having recourse to chance.<sup>6</sup> In many of the States, they have power to determine whether a partition can be made without great prejudice to the cotenants, and may, instead of attempting a partition, report to the Court that they find a division prejudicial or impracticable, and that they therefore advise a sale.

<sup>1</sup> *Allen v. Hall*, 50 Me. 263. Examine this case for a general discussion of the duties and powers of commissioners. See also *Kane v. Parker*, 4 Wis. 123; *Maryin v. Titsworth*, 10 Wis. 320.

<sup>2</sup> *Brown v. Bulkley*, 11 Cush. 168.

<sup>3</sup> Absence of oath of commissioners held to avoid partition, *Massey v. Massey*, 4 H. & J. 144. For contra opinion, see *Wilcox v. Cannon*, 1 Cold. 369; *Bledsoe v. Wiley*, 7 Humph. 507.

<sup>4</sup> *Field v. Hanscomb*, 3 Shep. 367; *Lewis v. The C. I. Co. of Cinn.* 23 Ind. 445; *Buck v. Wolcott*, 15 Gray, 502; *Coply v. Crane*, 1 Root, 69; *Hunter v. Brown*, 7 B. Monr. 285.

<sup>5</sup> This is the method preferred in Chancery. Danl. Ch. Pr. p. 1158, 4th ed.

<sup>6</sup> *Cecil v. Dorsey*, 1 Md. Ch. 225.

According to the Chancery practice in England, the proceedings of the commissioners are open; they may be attended by the parties and their solicitors; witnesses may be examined and cross-examined under the control of the commissioners; and every step may be taken necessary "to discover the truth and enable the commissioners to make a proper return."<sup>1</sup> This evidence is confined to the proof of such facts only as will be necessary to enable the commissioners to make proper and impartial allotments. The first duty of the commissioners is to divide the subject-matter of the partition into as many shares and proportions as the decree or order under which the commission issues directs. They must next allot these proportions to the respective cotenants. In so doing, they must take into consideration all the circumstances. They have no right to make an arbitrary allotment.<sup>2</sup> They should, so far as they can do so without injustice to the others, assign each cotenant the part most valuable to him, whether this special value arose from his having made improvements or from any other cause.<sup>3</sup> If there are several parcels, they need not divide each parcel, but may assign one parcel to each cotenant.<sup>4</sup> Unless authorized to do so by the decree under which they were appointed, commissioners cannot award owelty of partition.<sup>5</sup> Neither the commissioners nor the Court can, unless so authorized by statute, divide the land into town lots and give part of the land to the public for streets.<sup>6</sup> In Maine, the commissioners cannot assign to one of the parties the right to haul lumber on the other's lands, nor to drive logs or use a dam there.<sup>7</sup> But in England it is understood that the commissioners may make such directions as are necessary to an equitable partition, and to assure to the parties an equitable enjoyment in severalty. They may therefore lay out a road

<sup>1</sup> Danl. Ch. Pr. 4th ed. 1154. The same rule prevails in Maryland. *Cecil v. Dorsey*, 1 Md. Ch. 226.

<sup>2</sup> *Canning v. Canning*, 2 Drewery, 494.

<sup>3</sup> *Story v. Johnson*, 1 Y. & C. Ex. 546.

<sup>4</sup> *Earl of Clarendon v. Hornby*, 1 P. Wms. 446; *Smith v. Barber*, 7 Ohio, Part 2, p. 118.

<sup>5</sup> *Mole v. Mansfield*, 15 Sim. 41; Danl. Ch. Pr. 1157, 4th ed.; *Peers v. Needham*, 19 Beav. 816. Contra—*Smith v. Smith*, 10 Pai. 477; *Wood v. Little*, 85 Me. 112.

<sup>6</sup> *Kitchen v. Sheets*, 1 Ind. 139.

<sup>7</sup> *Dyer v. Lowell*, 30 Me. 219.

across the purparty of one of the cotenants, in order that the other may have a means of passing to and from his purparty; and they may order fences to be built and maintained between the lands assigned to the parties.<sup>1</sup> And no doubt the law, as thus understood in England, prevails in the greater portion of these United States. In a case in New York, where the subject-matter of the partition consisted of certain mills and water privileges, the Court, speaking of the power of the commissioners, said: "In short, the commissioners who are to make the partition may divide the dam and the lands under the water, and may make such provisions for keeping the different portions of the dam, and the waste gates and flumes in the same, in repair, and such regulations for the use of the water power which is not capable of actual partition without a destruction of its value, as the parties might make by a partition deed between themselves, and by agreeing for a compensation to be paid by one party to the other, if necessary, so as to make that partition perfectly equal, so far as human judgment is capable of producing equality in such a case."<sup>2</sup>

§ 523. **Report.**—When the commissioners have completed their allotments, they must prepare and return to the Court whence the commission issued a report showing what they have done, and the proceedings had before them.<sup>3</sup> When

<sup>1</sup> *Lister v. Lister*, 3 Y. & C. Ex. 544, 546.

<sup>2</sup> *Smith v. Smith*, 10 Pai. 478; *Hill v. Dey*, 14 Wend. 204; *Morrill v. Morrill*, 5 N. H. 184. The commissioners have not, in New Hampshire, authority to make partition by assigning to each of the cotenants the exclusive occupation for alternate periods of time. *Crowell v. Woodbury*, 52 N. H. 613.

For provisions in reference to appointment and duties of commissioners, see Rev. Code, Ala., sec. 3108-13; Gould's Ark. Dig., 813, secs. 16-18; O. C. P. of Cal., secs. 763-4; Laws of Del., p. 528, sec. 5; Ib. 529, sec. 10; Bush's Dig. Fla., 618, sec. 6; Code of Geo., secs. 3999-4000; Gross' St. of Ill., 470, sec. 9; Code Iowa, sec. 3290; C. P. of Kans., sec. 619, p. 24; Rev. St. Me., 695, secs. 13-16; 2 Stanton's St. of Ky., 101, 102; 2 Comp. Laws Mich., secs. 6273, 6288-91; Genl. St. Mass., 790, secs. 21-24; Bissell's St. of Minn., 888, secs. 6-7; Rev. Code Miss., secs. 1818-27; Genl. St. of Mis., 812, secs. 16-21; O. P. of Neb., sec. 812; Comp. Laws Nev., secs. 1338-9; Genl. St. N. H., 464, secs. 10-13; Nixon's N. J. Dig., 4th ed., 666, secs. 1-6; 3 Rev. St. N. Y. 609, secs. 34-41; Swan's St. of Ohio, 591, secs. 4, 5; Deady's Laws of Oregon, 256, sec. 424; Brightly's Purdon's Dig., 1116, sec. 22; Rev. St. S. O. 532, sec. 10; Thompson & Steger's St. Tenn., secs. 3279-81; Genl. St. Vt., 354, sec. 6; Taylor's St. Wis., 1682, secs. 23-26.

<sup>3</sup> *Hathaway v. Persons Unknown*, 32 Me. 187.



evidence has been taken, it should be returned with the report. The report must show how the property has been divided, and to whom the several parts have been allotted. The report of the commissioners need not be unanimous. "We think the true rule is, that where three or more persons are charged with a judicial or a quasi judicial function under an authority derived, not from the parties in interest merely, but from a law or statute of the State, though *all* must hear and deliberate together, a majority may decide. But though a majority may decide, all should be present to hear and deliberate, and we think the report at any rate, when not signed by all, should show affirmatively that all were so present."<sup>1</sup> The report is sufficiently certain, if it is capable of being reduced to certainty by a survey.<sup>2</sup> "If the commissioners are equally divided, both returns will be quashed."<sup>3</sup>

§ 524. On the death, resignation, or refusal to act, of any of the commissioners, the Court may appoint others in their places, who have power to complete the partition.<sup>4</sup>

§ 525. **Vacating Report.**—The report of the commission is not final. It may be set aside by the Court.<sup>5</sup> But where the Court is asked to set aside the action of the commissioners, on the ground that they erred in making their allotments, whereby an unequal partition has been made, it will not grant the relief asked except in extreme cases—cases in which the partition is based on wrong principles, or it is shown by a very clear and decided preponderance of evi-

<sup>1</sup> *Townsend v. Hazard*, 9 B. I. 442, 444; *Underhill v. Jackson*, 1 Barb. Oh. 73; *Scuyler v. Marsh*, 37 Barb. 354; *Kane v. Parker*, 4 Wis. 128.

<sup>2</sup> *Boyd v. Doty*, 8 Ind. 374.

<sup>3</sup> *Danl. Ch. Pr.* 1159; *Watson v. Duke of Northumberland*, 11 Ves. 153, 162.

For report, see *Rev. Code Ala.*, sec. 3111; *Gould's Ark. Dig.*, 813, sec. 19; *C. C. P. of Cal.*, sec. 765; *Gross' Ill. St.*, 470, sec. 9; *Code Iowa*, sec. 3292; *C. P. of Kans.*, 622; *Rev. St. Me.*, 696, sec. 21; 2 *Stanton's St. of Ky.*, 101, sec. 6; *Comp. Laws Mich.*, sec. 6292; *Genl. St. Mass.*, 700, sec. 29; *Bissell's St. of Minn.*, 889, sec. 7; *Rev. Code Miss.*, sec. 1825; *Genl. St. of Mis.*, 613, secs. 22-3; *Comp. Laws Nev.*, sec. 1340; *Genl. St. N. H.*, 464, secs. 13, 14; *Nixon's Dig. N. J.*, 4th ed., 668, sec. 7; 3 *Rev. St. N. Y.*, 610, sec. 42; *Deady's Laws Oregon*, 257, secs. 427-8; *Genl. St. R. I.*, 523, secs. 27-29; *Rev. St. S. C.*, 533, sec. 12; *Thompson & Steger's St. Tenn.*, 3282; *Genl. St. Vt.*, 354, sec. 8; *Taylor's St. Wis.*, 1683, sec. 27.

<sup>4</sup> *Rev. Code Ala.*, sec. 3115; *Gould's Ark. Dig.*, 816, sec. 37; 2 *Comp. Laws Mich.*, sec. 6289; *Rev. Code Miss.*, sec. 1821; *Taylor's St. Wis.*, 1683, sec. 24.

<sup>5</sup> *Riggs v. Dickinson*, 2 Scam. 439.



dence that the commissioners have made a grossly unequal allotment.<sup>1</sup> In one case, it was said that "the report of the commissioners is to be regarded in the light of a verdict of a jury rendered upon a trial at law; and it will be disturbed or interfered with by the Court only upon grounds similar to those on which a verdict would be set aside and a new trial granted. Nay, more: it will be regarded with greater consideration even than a verdict, because, in this particular instance, the commissioners are persons who were selected by the parties themselves on account of their superior judgment and capacity to perform this particular service, and they were authorized to act upon a personal view of the property, and upon their individual knowledge of its value, location, etc., which they were left to acquire at their leisure, and from all the best sources of information in their power, and without regard to rules and forms of judicial proceedings in acquiring their knowledge."<sup>2</sup> In England, "it is improper for the Court to interfere with the valuation of commissioners, unless there be any mistake in it so gross as to induce the Court to think that the commissioners have acted from unjust, corrupt, or fraudulent motives."<sup>3</sup>

§ 526. **Vacating Report for Error in Proceeding.**—The report of the commissioners may also be set aside for errors in their proceeding affecting the rights of the parties, and on account of which the law presumes that the party complaining may have been injured. Hence, the report will be set aside when the parties had no notice of the meeting of the commissioners, and, on that account, did not attend.<sup>4</sup> "If the report be set aside for the misconduct of the commissioners, or any of them, new ones may be appointed in their places. If for a mere irregularity or unintentional omission to perform some duty, such as to give notice to the parties,

<sup>1</sup> In the Matter of the Division of the Real Estate of J. S. Thompson, 2 Green Ch. 687; Hay v. Estell, 19 N. J. Eq. 135; Story v. Johnson, 1 Y. & C. Ex. 538; Jewett v. Scott, 19 Tex. 568; Geer v. Winds' Executors, 4 Desaus, 85; Wilhelm v. Wilhelm, 4 Md. Ch. 331; Morrill v. Morrill, 5 N. H. 329; Nicelar v. Barbrick, 1 Dev. & Bat. 257; Kane v. Parker, 4 Wis. 123.

<sup>2</sup> Livingston v. Clarkson, 4 Edw. Ch. 597; Doubleday v. Newton, 9 How. Pr. 71.

<sup>3</sup> Lister v. Lister, 3 Y. & C. Ex. 544.

<sup>4</sup> Doubleday v. Newton, 9 How. Pr. 72.

or to take the oath prescribed by statute, the same commissioners will be retained, and proceed a second time to execute the order for partition. If there is any formal inaccuracy in the report of the commissioners, it may be amended."<sup>1</sup> The partition must be made by commissioners. If the Court sets aside the report of the commissioners, it cannot proceed to make a partition, but must refer the partition back to the same commissioners, or appoint others in their stead. In one instance, a partition made by the Court without the assistance of commissioners was declared void, when collaterally drawn in question.<sup>2</sup>

§ 527. **The Final Judgment or Decree.**—If no motion is made to set aside the report of the commissioners, or if such motion is made and denied, the next step is to have the final judgment or decree entered.<sup>3</sup> Under a vast majority of

<sup>1</sup> 2 Van Santvoord's Eq. Pr. 47.

<sup>2</sup> *George v. Murphy*, McBride's Mo. Decis. 779; S. C. 1 Mo. 558.

<sup>3</sup> A decree, where no conveyance is necessary, may be as follows:

[Title of Court and Cause.]

The report of A, B, and C, commissioners heretofore appointed by this Court, having been filed herein on the — day of —, whereby it appears that they have made partition of the premises described in the plaintiff's complaint, according to the respective rights and interests of the parties to this action, as the same have been ascertained and declared by this Court, by which partition the said commissioners have divided the whole of said premises, as follows: They have set off in severalty to D one allotment, bounded and described as follows [description]; and to E one allotment [proceed to state each allotment.]

Now therefore, on motion of F, attorney for plaintiff, it is hereby ordered and adjudged that the said report stand, in all respects, ratified and confirmed; and that the partition so made be firm and effectual forever.

It is further adjudged that the said E pay to the plaintiff — dollars, being — part of his costs and disbursements in this action, and that execution issue therefor.

As the suit for partition may involve other claims arising out of the cotenancy, it follows that the final decree in partition may contain other provisions than those necessary to effect a mere division of the property. The decree may direct sums to be paid for owelty of partition, or for a balance found due upon an accounting, or for improvements made in good faith. It may direct conveyances of the legal title to be made, and, in short, may contain any provision or direction which the Court finds necessary to accomplish, between the parties, an equitable adjustment of all their rights arising out of their relation to the common property. Costs, which are now almost uniformly recovered in judgments and decrees of partition, were denied to the complainant under the common and statute law of England.—Allnatt on Partition, 75. When the question of costs arose in Chancery, the Lord Chancellor declared "that as the party came into equity, instead of going to law, for his own convenience, the rule of law should be adopted; and therefore no costs should be given until the commission; that the costs of issuing, executing, and confirming the commission should be borne by the parties in proportion to the value of their respective

the statutes of partition in force in the United States, an actual partition is fully consummated by the entry of this judgment or decree; and no necessity exists for conveyances to be subsequently executed by the parties.<sup>1</sup> The title, which by force of the final judgment or decree is vested in severalty in the various persons to whom the respective allotments were made, is said to relate back to the date of the filing of the commissioner's report. "Where a decree or judgment of a Court is rendered, declaring rights of property in tenants in common of things capable of division, and a partition is ordered, made, and reported, an inchoate right of property is raised, which the subsequent judgment of confirmation perfects. In such case, the title has relation back to the division, and starts from that time; in like manner as the right of property in an administrator is held to relate back to the death of the intestate, for the more complete protection of estates."<sup>2</sup>

interests; and there should be no costs of the subsequent proceedings."—*Agar v. Fairfax*, 17 Ves. 558. In New York, the Chancellor ordered all the costs, both of complainants and defendants, to be taxed, and the aggregate amount to be apportioned among the parties according to their respective interests.—*Tibbits v. Tibbits*, 7 Pal. 204. This is now the general rule, (*Coles v. Coles*, 2 Beas. Ch. 366,) except where one of the parties has incurred unnecessary costs, in which case the party in fault must pay the amount of costs which his fault has occasioned.—*Hamersly v. Hamersly*, 7 N. Y. Leg. Obs. 127. In some of the States, the complainant is allowed a reasonable fee for his counsel (*Lowe v. Phillips*, 21 Ohio St. 657); but the rule is generally the other way.—*Coles v. Coles*, 2 Beas. Ch. 366; *Williamson v. Williamson*, 1 Met. Ky. 304.

<sup>1</sup> *Young v. Frost*, 1 Md. 408; *Street v. McConnell*, 16 Ill. 126; *Van Orman v. Phellps*, 9 Barb. 503; *Swett v. Swett*, 49 N. H. 264; *Griffith v. Phillips*, 3 Grant's Cas. 381; *Wright v. Marsh*, 2 G. Greene, 110; *Young v. Cooper*, 3 Johns. Ch. 295. Contra—*Smith v. Moore*, 6 Dana, 417.

<sup>2</sup> *Dixon v. Warters*, 8 Jones, 451.

## CHAPTER XXVII.

### EFFECT OF THE PARTITION.

Sustained against Collateral Assaults, § 528.

Whether it binds Title or Possession only, § 529.

Is Conclusive on all the Issues, § 530.

Where Title is in Issue, it is Bound, § 531.

After-acquired Title, § 532.

Failure of Title after Partition, § 533.

Vacating and Correcting in Equity, § 534.

Confirming Invalid and Imperfect Partitions, § 535.

§ 528. **Collateral Attack on Judgment in Partition.**—As a judgment or decree of partition, in the United States, operates effectually, independent of conveyances between the parties, and is followed by no further assurance of title, it becomes important to determine its effect both as an instrument transferring title and as an adjudication of the material issues made or tendered in the suit out of which it arose. But before considering the effect of any judgment or decree, it is first necessary to determine whether it is to be treated as a binding adjudication, or whether, from some vice or infirmity, it is to be disregarded altogether. A judgment in partition is, according to a very decided preponderance of the authorities, shielded from collateral assault as fully as any other judgment. It cannot be avoided for error or irregularity, and is valid unless the Court had not jurisdiction of the subject-matter of the action or of the party against whom the partition is sought to be enforced. It may be avoided for fraud; but not, as we apprehend, under circumstances which would not authorize the avoidance of any other judgment tainted by like fraud. The prosecution of jurisdictional inquiries must, as a general rule, be conducted in the same manner, when the judgment is in partition, as

though its origin were in some other form of action. Where the record, or other competent evidence before the Court, fails to show whether some jurisdictional step was taken, it will generally be presumed that the Court granting the partition did not proceed without taking every essential step.<sup>1</sup> But what we have here represented to be the result of the majority of the authorities does not meet with universal concurrence. In Kentucky, the record of a proceeding in partition will be disregarded unless it shows affirmatively that the various steps required by law have all been taken.<sup>2</sup> Hence, a judgment in partition was there treated as void because the record did not show whether the commissioners were sworn.<sup>3</sup> In Massachusetts, the proceedings of the Probate Court in making partition are strictly construed. If this Court makes an order which the law did not authorize it to make, the error need not be corrected by appeal. The order may be disregarded as fully as if never made.<sup>4</sup> In Maine, a record in partition, when offered in evidence, was excluded because it did not show whether the defendant had been notified of the suit, although it appeared that he attended the meeting of the commissioners.<sup>5</sup> In New York, where the Court confessedly had jurisdiction of the suit in partition and of the parties thereto, the judgment was held invalid in the Supreme Court, on the ground that the record showed affirmatively that one of the commissioners did not act;<sup>6</sup> and in an earlier case in the same State, a partition was

<sup>1</sup> For cases containing judgments and decrees of partition against collateral attacks, see *Snevely v. Wagner*, 8 Penn. St. 396; *Wright v. Marsh*, 2 G. Greene, 110; *Cole v. Hall*, 2 Hill, 627; *Merklein v. Trapnell*, 34 Pa. St. 47; *Herr v. Herr*, 5 Pa. St. 430; *Painter v. Henderson*, 7 Pa. St. 51; *Lockhart v. John*, 7 Pa. St. 139; *Lair v. Hunsicker*, 28 Pa. St. 123; *Girard Life Ins. Co. v. F. & M. Bank*, 57 Pa. St. 392; *Fowler v. Succession of Gordon*, 24 La. An. 270; *Lessee of Foster v. Exr. of Dugan*, 8 Ohio, 106; *Wilson v. Bull*, 10 Ohio, 256; *Castle v. Matthews*, Hill & D. 438; *Croghan v. Livingston*, 17 N. Y. 220; *Austin v. Charlestown Seminary*, 8 Met. 202; *Foster v. Abbot*, 8 Met. 598; *Richards v. Rote*, 68 Penn. St. 253; *Wilson v. Smith*, 22 Gratt. 493; *Waltz v. Borroway*, 25 Ind. 380; *Johnson v. Kirkhoff*, 35 Mo. 291; *Latrielle v. Dorleque*, 35 Mo. 233; *Bohart v. Atkinson*, 14 Ohio, 428; *Herbert v. Smith*, 6 Lans. 493.

<sup>2</sup> *Craig v. Barker*, 4 Dana, 601; *Guyton v. Shane*, 7 Dana, 498.

<sup>3</sup> *Smith v. Moore's Heirs*, 6 Dana, 417.

<sup>4</sup> *Jenk v. Howland*, 3 Gray, 537; *Newell v. Sadler*, 16 Mass. 122; *Thayer v. Thayer*, 7 Pick. 209.

<sup>5</sup> *Dean v. Hooper*, 31 Me. 109. See also *Harris v. Preston*, 5 Eng. 206.

<sup>6</sup> *Schnyler v. Marsh*, 37 Barb. 356.

declared to be void because the parties were not tenants in common of all the lands divided.<sup>1</sup>

§ 529. **Whether Title is Bound, or Possession only.**—  
 “The high regard of the people among whom the common law grew into being, for real property, evinced itself in a vast variety of ways in the different branches of that law; and in none of those branches did it make itself more evident than in the branch relating to the effect of former adjudications. The pursuit of any of the forms of personal action to a judgment on the merits, completely barred all other actions, based on the same right, in every other form. But that the law gave ‘consecutive remedies for injuries to real estate is recognized in all the books that treat on real action.’”<sup>2</sup> In *Ferrer’s Case*, 6 Coke 7, “it was decided that there was a difference between real and personal actions; that in personal actions the bar is perpetual, for the plaintiff cannot have an action of a higher nature; but if demandant be barred in a real action by judgment, he may have an action of a higher nature to try the same right again.”<sup>3</sup> Partition was, at common law, classed as a real action. The judgment in partition therefore had no higher effect, as *res judicata*, than if rendered in some other real action of like dignity. Partition was considered as a mere possessory action, which left *the title* as it found it.<sup>3</sup> Speaking of a judgment in partition, the Supreme Court of Pennsylvania said: “What was the legal effect of that judgment? It did not determine title between tenants in common who held by descent from a common parent. It decided only that it should be parted and divided among them. It is the partition that is to remain firm and stable. The parties acquire no new title: there is nothing but dividing the old one among them.”<sup>4</sup> Judge Story thus described the effect of a common law partition: “The present suit is a writ of right, and no judgment in a writ or petition for partition will constitute any bar to

<sup>1</sup> *Jackson v. Meyers*, 14 Johns. 355.

<sup>2</sup> *Freeman on Judgments*, sec. 293.

<sup>3</sup> *Pierce v. Oliver*, 13 Mass. 212; *Nicely v. Boyles*, 4 Humph. 177; *Nash v. Cutler*, 16 Pick. 500; *Whitlock v. Hale*, 10 Humph. 64; *Goundie v. Northampton Water Co.* 7 Pa. St. 238; *Richman v. Baldwin*, 1 Zab. 398.

<sup>4</sup> *McClure v. McClure*, 14 Penn. St. 136; *Harlan v. Langham*, 69 Penn. St. 237.

the maintenance of a writ of right between the same parties. A writ of partition, or a petition for partition, which is but a substitute for the former, is a mere possessory action; and, at most, a judgment in a possessory action can bar only an action of as high a nature, that is a possessory action; for the judgment only establishes the right of possession. But a writ of right is in no sense a possessory action. It is founded on the mere right, and not upon the possession; and the general issue or mise is but a trial of the mere right. The plea of the demandant of a sole seizin, to the petition of partition, even if it were found against him, would only disprove his sole seizin at the time when the petition was filed. It would not prove that he was not so seized at any time prior within the last twenty years, which is the statute limitation of writs of right. It could not be pleaded as a bar to a writ of right, or as an estoppel thereof; since it did not, and could not, try the same question, who had the better mere right. The most that can be said is, that it is admissible as evidence between the same parties. But of what is it evidence? Certainly only of the very fact of sole seizin put in issue by the pleadings; and that can properly apply only to sole seizin at the time when the partition was filed."<sup>1</sup> "When partition is made pursuant to the writ *de partitione faciendâ*, and the shares are allotted in severalty by the sheriff, and final judgment is given that the partition be holden firm and effectual forever, nothing further is necessary; for the partition is completely effectual, whether the parties were seized as coparceners, joint-tenants, or tenants in common. The judgment of law operates to vest in each party a sole seizin in his allotment; but nothing further is wrought than to affirm or ascertain the possession."<sup>2</sup>

§ 530. **Conclusive on all the Issues.**—But if a judgment in partition is not conclusive upon the title of the parties, this is only because the title was not, according to the law of the State where the partition was made, within the issues made or tendered in the action. The rule that a judgment

<sup>1</sup> *Mallet v. Foxcroft*, 1 Story C. C. 475.

<sup>2</sup> *Allnatt on Partition*, 123 and 68, citing *Haward v. Duke of Sussex*, Dy. 79 b, *Fitz Abr.* 142; *Cave v. Holford*, 3 Ves. 656.



is conclusive upon all the issues determined by it, is not less applicable to judgments in partition than to judgments in any other form or kind of action.<sup>1</sup> One of the issues which such a judgment ordinarily determines is, that the parties were in possession of the property, holding it as cotenants. Hence, a party to a partition suit is estopped from showing that at the time of the partition he was holding any part of the premises in severalty adversely to his cotenants,<sup>2</sup> or that the petitioner had no interest in the property.<sup>3</sup>

§ 531. **Where Title is in Issue, it is Bound.**—In the greater portion of the United States, actions for partition, like actions in ejectment, have ceased to be mere possessory actions, and have come to involve the *right* as well as the possession. Wherever this is the case, a judgment or decree in partition is conclusive of every right to which any of the parties was entitled to at the institution of the suit. “The parties to the record are concluded from averring that any other right vested in them or any of them at the time of the proceeding than the record imports.”<sup>4</sup> In New Hampshire, the Superior Court of Judicature, after considering the effect of a judgment in partition, concluded as follows: “There is nothing, then, on which to found a distinction in this respect between a verdict and judgment in a petition for partition and a verdict and judgment in a writ of entry. The former is of as high a nature as the latter. If the one may lie after the other, it cannot be to try the same question of title which has been put in issue and tried in the first. This cannot be done even in a writ of right. ‘It is not the recovery, but the matter alleged by the party, and upon which the recovery proceeds, which creates the estoppel.’ The conclusion is inevitable that as by the statute the right of the party to a share—which is, in other words, his title to a share—may be tried in a petition for partition, and a judgment rendered, that judgment is as valid and conclusive as to the matter put

<sup>1</sup> *Flagg v. Thurston*, 11 Pick. 431; *Ihmsen v. Ormsby*, 32 Pa. St. 200; *Foxcroft v. Barnes*, 29 Me. 129; *Rabb v. Aiken*, 2 McCord's Ch. 125; *Dixon v. Warder*, 8 Jones, 450; *Herr v. Herr*, 5 Pa. St. 428; *Burghardt v. Van Deusen*, 4 Allen, 375.

<sup>2</sup> *Edson v. Munsell*, 12 Allen, 600; *Cole v. Hall*, 2 Hill, 627.

<sup>3</sup> *Burghardt v. Van Deusen*, 4 Allen, 376.

<sup>4</sup> *Reese v. Holmes*, 5 Rich. Eq. 540; *Muse v. Edgerton*, Dud. Eq. 179.



in issue and tried as a judgment in any other proceeding.”<sup>1</sup> The following statement of the law of partition in Missouri is equally applicable in many other States. The suit was in ejectment. It appeared that the plaintiff had been a party to a suit in partition; but he claimed that the partition affected another and different title from that which he now sought to assert by ejectment. “The judgment of partition establishes the title to the land which is the subject of the partition, and, in an action of ejectment upon an adverse possession, or an adverse title existing at the date of the partition, it is final and conclusive at law upon all parties to the record, and on all persons holding under them afterwards.”<sup>2</sup> The statute requires that the petition shall set forth the rights and titles of all parties interested in the premises sought to be divided, and of all persons having, upon any contingency, a beneficial interest therein, present or expectant. It requires the Court to ascertain by evidence, by confession, or by verdict, and to declare the rights, titles, and interests of the petitioners and defendants; and the final judgment, that the partition be firm and effectual forever, is made binding and conclusive on all parties to the proceedings, and their representatives, and on all those claiming under them by right derived after the commencement of the suit. It provides further that if it shall appear that there are parties claiming the same portion adversely to each other, the Court may decide upon such adverse claims, or, in its discretion, direct such share to be allotted, subject to such claims; and there can be no doubt that if any party defendant wholly denied the tenancy in common, and claimed the land adversely to the plaintiff, he could so answer, and if that issue were found for him, it would entirely defeat the partition as against him. When the title or possession is held adversely, that matter must first be settled either in the partition suit, when it can be done under the statute, or by an action of ejectment, before a partition can be had, either at law or in equity. It is only when lands are held in joint-tenancy, tenancy in common, or coparcenary, that a partition will lie under the statute or at common law; and unless such

<sup>1</sup> *Whittemore v. Shaw*, 8 N. H. 397.

<sup>2</sup> *Clapp v. Bromagham*, 9 Cow. 569.

holding be averred and established, there is an end of the partition. The plaintiff might have asserted his adverse title in the partition suit, or pleaded it in bar, and if decided against him, he had his remedy by appeal or writ of error. The judgment must be taken as conclusive here that no such defence was made, or that, if made, it was decided against him. Not having asserted his claims there, they were wholly barred at law."<sup>1</sup> In Illinois, it has been held that a widow who had been a party defendant in a suit for partition could not thereafter assert that she was entitled to the premises as a homestead.<sup>2</sup> But in the same State partition is regarded as a proceeding at law, and therefore as not conclusive upon equitable titles held by any of the parties.<sup>3</sup>

§ 532. **After-acquired Title.**—The estoppel arising from judgments is usually, if not universally, confined to rights held by the parties to the suit, and which they could, if so disposed, have asserted therein. Hence, a judgment in ejectment is never a bar to the assertion of a title acquired by the losing party subsequently to the rendition of such judgment. The same rule has been adjudged to be equally applicable to judgments in partition. Hence, a party to a partition who subsequently acquired a new and independent title—one that was in no way represented by any of the parties to the partition—was permitted to successfully assert such title when it proved to be paramount to the one involved in the partition suit.<sup>4</sup> But, in one instance, it was held that one of several heirs was bound by a decree of partition, not only as to rights held by him at the date of the partition, but also as

<sup>1</sup> *Forder v. Davis*, 38 Mo. 115. See also *Mills v. Witherington*, 2 Dev. & Bat. 433; *Morenhout v. Higuera*, 32 Cal. 295; *Short v. Prettyman*, 1 Hous. Del. 334; *Doolittle v. Don Maus*, 34 Ill. 457.

<sup>2</sup> *Wright v. Dunning*, 46 Ill. 272.

<sup>3</sup> *Greenup v. Sewell*, 18 Ill. 53. See also *Williams v. Van Tuyl*, 2 Ohio St. 336. For effect of judgment in partition as prescribed by statutes: Rev. Code Ala., sec. 3113; Gould's Ark. Dig., 814, sec. 21; C. C. P. of Cal., secs. 766-7; Genl. St. Conn., 398, secs. 38-41; Code Geo., secs. 4002-7; Gross' Ill. St., 471, secs. 11-13; Code Iowa, secs. 3298-3306; Rev. St. Me., 696, secs. 22-28; Comp. Laws Mich., secs. 6296-6307; Genl. St. Mass., 701, secs. 32-3; Bissell's St. of Minn., 889, secs. 8, 9; Rev. Code Miss., sec. 1828; Genl. St. of Mis., 613, sec. 25; Comp. Laws Nev., secs. 1341-2; Deady's Laws Oregon, 257, secs. 428-9; Thompson & Steger's St. Tenn., secs. 3291-2; Code of Va., 921, sec. 3; Code West. Va., 486, sec. 3; Taylor's St. Wis., 1684, secs. 31-2.

<sup>4</sup> *Tapley v. McPike*, 50 Mo. 592; *Woodbridge v. Banning*, 14 Ohio St. 330.

to rights subsequently acquired from other heirs who were not parties to the partition.<sup>1</sup> And the preponderance of the authorities is probably in favor of the theory that as each cotenant who has been evicted after a compulsory partition may call upon his cotenants to contribute their proportions of his loss, each of them is, by his obligation of warranty, estopped from asserting any independent adverse title to the purparties assigned to the others.<sup>2</sup>

§ 533. **Failure of Title after Partition.**—A parcener had, by the common law, when evicted by title paramount, the right to reënter and defeat the partition, or to obtain a recompense for the part which she had lost.<sup>3</sup> The statute of 31 Henry VIII., extending the right of partition to joint-tenants and tenants in common, provided “that every of the said joint-tenants or tenants in common, and their heirs, after such partition made, shall and may have aid of the other, or of their heirs, to the intent to deraign the warranty paramount, and to recover for the rate as is used between coparceners after partition made by the order of the common law.” This statute gave to joint-tenants and to tenants in common, as will be manifest from its inspection, the right of warranty and recompense only. They were not authorized to reënter and wholly defeat the partition.<sup>4</sup> The right of a cotenant who has, by title paramount to that partitioned, been evicted from the purparty allotted to him, to enforce contribution in equity for his loss has been frequently recognized and enforced in the United States;<sup>5</sup> and there has been at least one case in which the Court proceeded upon the theory that the party evicted might reënter and entirely avoid the partition.<sup>6</sup> In North Carolina, tenants in common of some slaves made a compulsory partition thereof. It

<sup>1</sup> Doe on dem. of Short v. Prettyman, 1 Hous. Del. 394. Contra, see Richardson v. Cambridge, 2 Allen, 122.

<sup>2</sup> Venable v. Beauchamp, 3 Dana, 325; Walker v. Hall, 15 Ohio St. 362; Mills v. Witherington, 2 Dev. & Bat. 433.

<sup>3</sup> Co. Litt. 174 a; Rawle on Covenants for Title, 4th ed. 473.

<sup>4</sup> Rawle on Covenants, 4th ed. 474; Ross v. Armstrong, 25 Tex. Supp. 372.

<sup>5</sup> Dugan v. Hollins, 4 Md. Ch. 147; Walker v. Hall, 15 Ohio St. 362; Sawyers v. Cator, 8 Humph. 256, 287.

<sup>6</sup> Feather v. Strochoecker, 3 Pen. & W. 508.

afterwards appeared that one of the slaves was, at the date of the partition, laboring under an incurable disease, by reason of which he was worthless; and that this fact was equally unknown to the cotenants and to the commissioners who made the partition. The cotenant to whom the diseased slave was allotted filed his bill after the death of the slave, praying that the others be decreed to pay a *pro rata* of the loss sustained thereby. The Court, in announcing its opinion granting the relief, said: "In partition of chattels, which is an equitable proceeding, a warranty is implied, not only of title, but of soundness; and the common law maxim 'caveat emptor' has no application, being restricted (as the word 'emptor' imports) to *sales* of chattels. In the conveyance of a fee-simple estate in lands, no warranty is implied, because there is no tenure. In partition of land, a warranty is implied, because of the *privity of estate*. In sales of chattels, a warranty of title is implied; but there is no implied warranty of soundness, the maxim of the common law being 'caveat emptor,' because it was thought some 'play' (as mechanics call it) ought to be allowed, for the chaffering and exercise of individual judgment, attendant upon the traffic in such articles when the parties are at arms'-length, and each is supposed to trade with his eyes open; so that in the absence of an express warranty of soundness, the purchaser of a chattel has no remedy except on the ground of deceit. Upon partition, the parties are in *equali jure*: there is supposed to be mutual confidence by reason of the privity of estate; and the object is to make an *equal division of a common fund*. There is no chaffering or trafficking about it. Third persons, selected by themselves, or appointed by the Court, make the division, and if the common fund is not so large as the parties suppose, either from defect of title or of unsoundness as to part, the loss should be borne equally: in other words, in partition there is an implied warranty both as to title and soundness."<sup>1</sup>

§ 534. **Correcting and Vacating in Equity.**—A final judgment or decree in partition is not more exempt from the

<sup>1</sup> *Nixon v. Lindsay*, 2 Jones Eq. 233.

interference and controlling power of courts of equity than are final judgments and decrees in other cases. Hence, such a mistake of facts, or such accident as would authorize a court of equity in enjoining or setting aside an ordinary judgment, will authorize it to set aside or correct a judgment or decree of partition.<sup>1</sup> And that degree of carelessness and inattention which would justify a court of equity in denying relief to the negligent party, in ordinary cases, will operate with like effect when the proceedings are in partition.<sup>2</sup> A voluntary partition, carried into effect by the aid of commissioners appointed by the parties, and which, by a mistake in running a line, is not made in accordance with the intention of the parties, is not a finality. It may be corrected in equity. And where the person whom the mistake injures is sued in ejectment, he may set up the facts, and thereby make out a good equitable defence.<sup>3</sup> After a decree of partition had been entered between some heirs, a mortgage on a part of the land, executed by their ancestor, and of which none of them had any knowledge, was foreclosed, and the mortgaged portion was sold. The heirs to whom the mortgaged portion had been assigned then petitioned the Court to set aside the decree of partition, and to order a new partition of the remaining lands. The petition was granted.<sup>4</sup>

§ 535. **Confirmation of Invalid and Imperfect Partitions.**—A partition which, in itself, is invalid as against some of the parties, or is imperfect because not sanctioned by the final judgment of the Court wherein it was made, may, no doubt, become binding by reason of the acquiescence of the party who had reason to complain of its imperfection or invalidity. Hence, a cotenant who, though not a party to the partition, accepts the portion allotted to him, and holds and conveys the same in severalty, will not be subsequently permitted to avoid the partition.<sup>5</sup> Where a decree

<sup>1</sup> *Ross v. Armstrong*, 25 Tex. Supp. 372; *Boyd v. Doty*, 8 Ind. 373; *George's Appeal*, 12 Penn. St. 260; *Douglass v. Ville*, 3 Sanf. Ch. 439.

<sup>2</sup> *Winn v. Dickson*, 15 La. An. 273.

<sup>3</sup> *Guedici v. Boots*, 42 Cal. 452.

<sup>4</sup> *Manning v. Horr*, 18 Iowa, 117.

<sup>5</sup> *Mellican v. Mellican*, 24 Tex. 439; *Jackson v. Richtmyer*, 13 Johns. 376.

of partition was not binding because it awarded the lands to one of the parties without requiring him to give security for the payment of the price at which it was awarded, it was held to have subsequently become binding on them by reason of various acts of ratification.<sup>1</sup> When the commissioners treated a portion of the property as part of a public street and made partition of the remainder, it was held that the acceptance of the partition by the parties estopped them from denying that the portion not divided was part of a street.<sup>2</sup> Several cases have been determined in which the commissioners made the allotments and reported the same to the Court. The parties accepted the allotments, and thereafter held their respective purparties in severalty; but no final judgment was entered confirming the partition and making it firm and stable forever. In such cases, the parties so taking possession have generally been held to be estopped from objecting to the want of a final judgment, and the Courts have refused to award a new partition.<sup>3</sup> But this rule has not been universally observed. In Maine, an heir who had acquiesced in a partition for eight years was held not to be estopped from claiming his undivided share of the estate, the only objection to the partition being that it had not been returned to nor accepted by the Court.<sup>4</sup>

<sup>1</sup> *White v. Clapp*, 8 Met. 370; *McQueen v. Fletcher*, 4 Rich. Eq. 152.

<sup>2</sup> *McGregor v. Reynolds*, 19 Iowa, 228.

<sup>3</sup> *Piatt v. Hubbel*, 5 Ohio, 243; *Welchel v. Thompson*, 39 Geo. 561; *Craig v. Craig*, Bai. Eq. 103.

<sup>4</sup> *Cogswell v. Reed*, 12 Me. 198.

## CHAPTER XXVIII.

### SALE INSTEAD OF PARTITION.

Sale, History of Authority of the Courts to order, § 536.

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Vacating Sale made to Commissioner or Guardian, § 546.

Releasing the Purchaser, § 547.

The Conveyance and its effect, § 548.

Distribution of the Proceeds, § 549.

§ 536. **History of Sale in Partition.**—We have so far treated the subject of partition upon the theory that the property was susceptible of division. We shall now consider the subject upon the theory that the property is not to be divided, but is to be sold, and its proceeds distributed among the respective parties, in proportion to their various interests. By the common law, and also by the earlier English statutes in reference to partition, no authority was conferred upon the Courts to compel a sale of the property.<sup>1</sup> The only remedy of the cotenants was to compel an actual partition irrespective of the loss and inconvenience it might occasion, or to buy or sell as best they could by their own voluntary agreements. Both in England and in America the power of the Courts has been enlarged, and they are no

<sup>1</sup> *Bipsham's Principles of Equity*, sec. 498; *Deloney v. Walker*, 9 Porter, 497; *Harkins v. Pope*, 10 Ala. 499.

longer compelled to order a partition of the property itself, when such a course is clearly ruinous to the parties. We find the present English law upon this subject thus summarized in the Solicitors' Journal and Reporter for July 26, 1872:<sup>1</sup> "Previously to the Partition Act, 1868, (31 and 32 Vict., c. 40,) where land was held in co-ownership, a majority, however large, of the co-owners could not insist upon a sale.<sup>2</sup> The act alters this rule, and provides, by section 4, that where the parties representing at least a moiety of the estate desire a sale, the Court *shall* direct a sale, unless it sees good reason to the contrary. On the other hand, by section 3, where persons representing less than a moiety desire a sale, the Court *may* order a sale, if, under all the circumstances, it appears more beneficial to the parties interested than a partition. As generally happens when a new rule is introduced by statute, the Judges were at first reluctant to forego the old practice; and in *Dicks v. Batten*, (not reported,) Vice-Chancellor Stuart held that a sale ought not to be granted at the instance of a party entitled to five-eighths in a case where partition could be made without difficulty—a decision which Vice-Chancellor Malins followed in *Pemberton v. Barnes*.<sup>3</sup> The latter decision was, however, overruled by Lord Hatherley,<sup>4</sup> and it may now be considered as settled that if the owners of a moiety or more desire a sale, the owners of the remainder must, even where the estate is large and a partition would be easy, show some special grounds to induce the Court to refuse a sale. The presumption is in favor of sale. In *Allen v. Allen*, decided by Vice-Chancellor Wickens recently, an attempt seems to have been made to force a sale on the owners of four-sixths, mainly on the ground that the Chief-Clerk had certified that a sale would be more beneficial to all parties than a partition. The majority desired a partition of the bulk of the property, and evidence was adduced to show (1) that though part of the property consisted of houses, a partition could be made

<sup>1</sup> Vol. 17, p. 742.

<sup>2</sup> *Turner v. Morgan*, 8 Ves. 143; *Parker v. Gerard*, Amb. 296; *Warner v. Baynes*, Amb. 589.

<sup>3</sup> 19 W. R. 709; L. R. 6 Ch. 687 n.

<sup>4</sup> See 19 W. R. 988; L. R. 6 Ch. 685.



without difficulty, and (2) that the property was increasing in value. The Vice-Chancellor thought that the balance of the argument might rather be in favor of a sale, but he held in accordance, as it seems to us, with the clear intention of section 3 of the act, that this circumstance was not sufficient to justify him in forcing a sale of the entire property upon the dissentient majority, and therefore made an order referring it to Chambers to make a partition of so much of the property as was capable of apportionment, and a sale of so much as was incapable of apportionment. There must be many cases in which justice will be best done by an order of this kind, which gives due effect to the wishes of the majority, but does not permit them to be carried to the unreasonable extent tolerated by the old rule."

§ 537. **When Ordered in the United States.**—The various States of the American Union had, long before the passage of the act referred to in the preceding section, enacted statutes authorizing the sale of lands held in cotenancy when an actual partition thereof could not be had without serious prejudice to the interests of the cotenants. A sale will not be ordered without good cause being shown. It is not sufficient that some or even a majority of the cotenants prefer a sale to a partition. The applicants for a sale must show the existence of such a state of facts as, under the statute, will be sufficient to rebut the presumption of law that each of the parties is entitled to an actual partition. The *onus* is always on him who seeks a sale.<sup>1</sup> But when the Court in which the suit for partition was instituted determines to grant or deny a sale, its action will be considered as, to a great extent, discretionary, and will not be reversed except in a clear case of error.<sup>2</sup> The grounds upon which a sale will be ordered in preference to a partition are substantially though not precisely identical in the different States. A sale is proper in Tennessee "when it is manifestly for the interest of the parties;"<sup>3</sup> in Vermont, when a partition cannot be

<sup>1</sup> Windley v. Barrow, 2 Jones Eq. 66; Davis v. Davis, 2 Ired. Eq. 607.

<sup>2</sup> Scott v. Guernsey, 48 N. Y. 125.

<sup>3</sup> Ross v. Ramsey, 3 Head, 15; Helm v. Franklin, 5 Humph. 405; Davidson v. Bowden, 5 Sneed, 129.

made without great inconvenience;<sup>1</sup> in New York and New Jersey, when partition can be made only by greatly prejudicing the owners;<sup>2</sup> in North Carolina, when a sale is best for the interest of the parties;<sup>3</sup> in Georgia, when the entire land will, by division, be depreciated in value;<sup>4</sup> in Mississippi, when a sale will best promote the interest of the parties;<sup>5</sup> in Maryland, when the lands cannot be divided without loss or injury to the parties interested;<sup>6</sup> in Virginia, when "the interests of those who are entitled to the subject, or its proceeds, will be promoted by a sale of the entire subject;"<sup>7</sup> and in Kentucky, "when a division of the land would materially impair its value."<sup>8</sup>

§ 538. **Not Granted when Parties are not entitled to Partition.**—A sale cannot be granted except under such circumstances as would have justified an actual partition previous to the passage of the statute authorizing a sale. Two distinct parcels of land cannot be joined in one suit for partition unless the same persons are cotenants of both tracts. Hence, the Court cannot order the sale of two distinct parcels of land in one suit, unless the same parties are cotenants of both tracts, although the lands are adjacent, and are so situate that they would together sell to better advantage than if sold separately.<sup>9</sup>

§ 539. **Sale is a Matter of Right.**—Actual partition was, by the common law, a matter of absolute right, irrespective

<sup>1</sup> *Baldwin v. Aldrich*, 34 Vt. 529.

<sup>2</sup> *Fleet v. Dorland*, 11 How. Pr. 490; *Bentley v. Long Dock Co.* 1 McCartner, 489.

<sup>3</sup> *Windley v. Barrow*, 2 Jones Eq. 66.

<sup>4</sup> *Royston v. Royston*, 13 Geo. 427.

<sup>5</sup> *Wilson v. Duncan*, 44 Miss. 642; *Pankey v. Howard*, 47 Miss. 87.

<sup>6</sup> *Thurston v. Minke*, 32 Md. 576.

<sup>7</sup> *Wilson v. Smith*, 22 Gratt. 502.

<sup>8</sup> *Burgess v. Eastham*, 3 Bush, 476. See Rev. Code Ala., secs. 3120-26; Gould's Dig. Ark. 813, sec. 17; Ib. 814, sec. 23 to 33; C. C. P. of Cal., sec. 763; Genl. St. Conn., 399, secs. 41-48; Bush's Dig. Fla., 619, secs. 9-12; Code of Geo., sec. 4003; Gross' St. of Ill., 470, sec. 11; Code Iowa, sec. 3290; 1 Genl. Laws of Md., 91, sec. 99; 2 Comp. Laws Mich., secs. 6267, 6287, 6298; Bissell's St. of Minn., 889, sec. 12; Rev. Code Miss., sec. 1828; Genl. St. of Mis., 611, sec. 1; 614, sec. 27; C. P. of Neb., sec. 814-844; Comp. Laws Nev., secs. 1327-38; Nixon's N. J. Dig., 4th ed., 669, sec. 15; 3 Rev. St. N. Y. 603, secs. 1, 29; Deady's Laws of Oregon, 256, sec. 426; Genl. St. R. I., 521, sec. 16; Rev. St. S. C. 530, secs. 8, 9; Thompson & Steger's St. Tenn., sec. 3293; Taylor's St. Wis., 1682, secs. 22-23; Ib. 1684, sec. 33.

<sup>9</sup> *Pankey v. Howard*, 47 Miss. 87.

of the fact whether the partition would prove beneficial or ruinous. Under the statutes authorizing the Court to order a sale in preference to a partition, such sale is a matter of absolute right when the circumstances designated by the statute are found to exist. It cannot be avoided on the ground that the property is so valuable that no one person can buy it, nor because one of the cotenants is unable to purchase, and fears his interests may, on that account, be sacrificed.<sup>1</sup>

§ 540. The constitutionality of statutes authorizing Courts to direct the sale of the property of cotenants has never been very seriously questioned. The point was, however, pressed upon the attention of the Supreme Court of Connecticut, and occasioned the following remarks: "A partition of joint estates, made by a writ of partition, at common law, or as provided by statutes, operates to divest one tenant of his interest in some part of the joint or common estate, and vest it solely in another. The tenants are seized *per my* or *per my et per tout*. This seizin is, by partition, destroyed, as much as in a case like the present. It is said that this common right is incapable of assessment or valuation; that its essential value is beneath the ground, and beyond the inspection and judgment of men. This may be true, and yet it presents no constitutional objection to the law; nor indeed any greater difficulty than if the same rights were to be appraised upon execution against one or all the tenants.

"The instances are common wherein it becomes necessary to cause the sale of real estate, without the concurrence or consent of the proprietor; and statutes authorizing this are to be found in every State, as in the cases of the sale of minor's land, and the lands of idiots, lunatics, and persons under conservators and guardianship. No constitutional objections to any such statute have ever been urged."<sup>2</sup>

§ 541. Appraisement instead of Sale.—In some of the States, when the nature and condition of the property are

<sup>1</sup> Bentley v. Long Dock Co. 1 McCartner, 489.

<sup>2</sup> Richardson v. Monson, 23 Conn. 97.

such that the statute will not compel an actual partition, the commissioners are authorized to make an appraisement instead of a partition. This appraisement is returned to the Court. If one of the parties is willing to take the property and pay the appraised value, he is permitted to do so. If none of the parties offers to take the property at the commissioner's valuation, or if two or more of them offer to take it in opposition to one another, a sale is ordered to be made. These statutes generally require that the sale shall not be for less than a specified portion of the appraisement.<sup>1</sup>

§ 542. **Sale when preferred to Partition.**—A sale may be advantageous to some of the cotenants and prejudicial to others. The question, then, to be determined is: Whose interests are to be consulted and promoted? In deciding this question, it must be remembered that the object of the statutes authorizing a sale was to obviate the manifest hardship and even destruction which arose in some cases in making a division of property. Where it is clear that no special loss or inconvenience will arise from partition, it ought to be ordered in preference to a sale, although it may happen that some or even a majority of the cotenants are in such circumstances that they prefer the latter to the former. In New York, in a suit to which some infants were parties, the Master ordered a sale. Chancellor Walworth, in reviewing this order, said: "The question is not, as supposed by the Master, whether it would be for the benefit of the infants to have their shares of the estate converted into money instead of remaining in land producing a less income. For if it is to their interest to sell their shares for the purpose of a better investment, it may be done afterwards under the general law relative to the sale of infants' estates, and when they will not run the risk of having their interest in a large property sacrificed for want of funds to compete with their adult tenant in common at the sale. The true question to be decided by the Master, under the statute, is whether the

<sup>1</sup> C. P. of Kans., secs. 625-6; Genl. St. N. H., 465, sec. 25; Swan's St. of Ohio, 592, secs. 8-11; Swan & Sawyer's St. Ohio, 505; Brightly's Purdon's Dig., 1115, sec. 18; Genl. St. Vt., 355, secs. 14-15; Code Va., 920, sec. 3; Code West. Va., 486, sec. 3; King v. Reed, 11 Gray, 490; Dyer v. Lowell, 30 Me. 217.

whole property, taken together, will be greatly injured or diminished in value if separated into parts, in the hands of different persons, according to their several rights and interests in the whole: in other words, whether the aggregate value of the several parts, when held by different individuals in severalty, would be materially less than the whole value of the property if owned by one person.”<sup>1</sup> “The words *great prejudice*, as used in the statutes, will not justify a decree of sale where the aggregate amount of the benefits to the parties from a sale, instead of an actual partition, will be small, in reference to the value of the property of which a partition or sale is sought.”<sup>2</sup> “The prejudice spoken of means a prejudice to *all* the owners, and not to a part only.”<sup>3</sup>

§ 543. The determination of the question whether a sale or a partition should be ordered must be made by the Court. In some of the States, the application for a sale is decided by the Court without the assistance or advice of the commissioners.<sup>4</sup> The more usual practice, however, unless in a case where it is clear that no actual division ought to be attempted, is to refer the partition to the commissioners. They then examine the property, and if, from such examination, they conclude that a sale is preferable to a partition, they report their conclusion to the Court, accompanying their report with a statement of the facts and reasons on which their opinion is based.<sup>5</sup> This report is not conclusive. Any of the parties may show, if he can, that the decision of the commissioners is erroneous.<sup>6</sup> In one instance where, in a suit for the division of certain slaves, the Court authorized the commissioners to determine the necessity of the sale, the decree was reversed, the appellate Court saying: “This is delegating to the commissioners the power of deciding upon the practicability of a partition and of directing a sale, which

<sup>1</sup> Clason v. Clason, 6 Pai. 545.

<sup>2</sup> Smith v. Smith, 10 Pai. 475.

<sup>3</sup> Van Arsdale v. Drake, 2 Barb. 601.

<sup>4</sup> At an early day in New York, it was held that the Court could decide on the necessity of a sale, on the report of the *Master* as well as on that of commissioners.—Thompson v. Hardman, 6 Johns. Ch. 436.

<sup>5</sup> Tucker v. Tucker, 19 Wend. 226; Steedman v. Weeks, 2 Strob. Eq. 148; Lake v. Jarrett, 12 Ind. 395.

<sup>6</sup> McCann v. Brown, 43 Geo. 386.

ought to be done by judicial authority, after the commissioners have reported the facts which obstruct partition and their opinion thereon.”<sup>1</sup> The order to sell the premises should not be made until the Court has entered its interlocutory judgment determining that the parties are entitled to partition, and has also, after making the proper inquiries, decided that a partition cannot be made without prejudice to the owners. An order of sale, when the record fails to show the existence of these preliminary steps, cannot support a sale made thereunder, “when exceptions are taken and interposed to its confirmation.”<sup>2</sup> It may so happen that the moieties of a portion of the cotenants can be assigned to them, while the moieties of the other cotenants cannot be assigned without working a great prejudice. In such case, the Court should decree an actual partition, so far as the same can be beneficially accomplished, and a sale of the moieties of which an actual partition is impracticable.<sup>3</sup> In making the sale, the property may be subdivided and sold in separate parcels, if that manner of proceeding be deemed best for the interests of the parties.<sup>4</sup>

§ 544. **Proceedings after Ordering the Sale.**—When the Court determines upon a sale of the whole or of some part of the property, it usually appoints a referee or commissioners to make the sale, though under some statutes this duty devolves upon the sheriff of the county. The manner of conducting the sale, the notice to be given thereof, and the powers and duties of the referees or commissioners, are the subjects of diverse statutory regulations, and can be best ascertained from an inspection of the statutes of the various States. When the sale is made, it must be reported to the Court, where it may be vacated or approved.

§ 545. **Vacating Sale, against wish of Purchaser.**—“A sale made by the Clerk and Master, under an order of a court of equity, is in no case complete until it is reported to and confirmed by the Court. Until then, the so-called purchaser is only a bidder, making an offer of a certain price for the

<sup>1</sup> *Irvin v. Divine*, 7 Mcnr. 248.

<sup>2</sup> *McLain v. Van Winkle*, 46 Ill. 406.

<sup>3</sup> *Haywood v. Judson*, 4 Barb. 228.

<sup>4</sup> *Wainwright v. Rowland*, 25 Mo. 53.

land, and showing his ability to pay by giving bond with good and sufficient security. If the Court be satisfied, from the Master's report, that the price offered is a good and fair one, it will accept the bid, by confirming the report and declaring the bid to be purchaser. But if, on the contrary, the Court be informed by the Master's report, or by affidavits, that the sum bid for the land is not its full value, it will be its duty to set aside the report and order a resale of the land. Of this the so-called purchaser has no right to complain, because he knew, or ought to have known, that his bid was made subject to the condition of its acceptance or rejection by the Court."<sup>1</sup> In the case in which the foregoing language was used, the appellant had bid in two parcels of land sold under a decree of partition. A motion was made to set aside the sale of one of the parcels for inadequacy in price, and was resisted on the ground that he had paid enough for that piece and had bid too much for the other unless the two parcels could be kept together. But the Court held that the sale was subject to the Chancery rule, and that a resale should be ordered, an offer of ten per cent. advance of the appellant's bid having been made. But we apprehend that this rule of the English Chancery is not usually applicable to sales in partition made in the United States, and that something beyond mere inadequacy of price must be shown to prevent the confirmation of a sale made by commissioners in partition. Paige, J., speaking for the Supreme Court of New York, in the case of *Lefevre v. Laraway*,<sup>2</sup> said: "The English practice, however, has not been adopted in this State. Here, neither before nor after the confirmation of the report of the sale, will a resale be ordered, upon an offer of an increase of price, alone. In this State, special circumstances must in all cases exist, where the sale is not void, to justify an order for a resale. A resale will be ordered where there has been fraud, or misconduct in the purchase; fraudulent negligence or misconduct in any other person connected with the sale; surprise or misapprehension, created by the conduct of the purchaser, or some person interested in the

<sup>1</sup> *Bost Ex Parte*, 3 Jones Eq. 483.

<sup>2</sup> 22 Barb. 173. See also *Comstock v. Purple*, 49 Ill. 167.



sale, or of the officer who conducts the sale." But it seems that the special circumstances under which the sale will be set aside, against the wishes of the purchaser, need not connect him with any fraudulent device. Where a sale was vacated in Missouri, the Supreme Court said: "In the case under consideration, it appears that rumors were afloat in the country that the sale would not take place on the 12th, but on the 13th, of the month, and that by such rumors bidders were prevented from attending the sale. If bidders were kept away by these rumors, it is of no consequence how they got into circulation, whether by act of the purchasers or otherwise."<sup>1</sup>

§ 546. **When a commissioner or other person authorized by the Court to conduct the sale is either the purchaser himself or is beneficially interested though the purchase is nominally made by some other person, this is a sufficient ground for vacating the sale.**<sup>2</sup> This rule applies to all other persons who are entrusted with some duty, the faithful performance of which is not consistent with their making profit out of the sale.<sup>3</sup> Hence, where one of the parties was an infant and the property was purchased by his guardian *ad litem*, the sale was vacated, and a resale ordered.<sup>4</sup>

§ 547. **Releasing the Purchaser.**—A purchaser at a partition sale may be released from his bid in certain cases. These cases, however, are confined to instances where he has become a purchaser through some fraud or misrepresentation, or the proceedings are so defective that he cannot by his purchase obtain the title sought to be affected by the partition. These sales import no warranty. The utmost that the purchaser has the right to demand is the title of the parties to the partition. He will, therefore, unless he has been made the victim of fraud or misrepresentation, be compelled to comply with his bid, although he can show the existence

<sup>1</sup> Goode v. Crow, 51 Mo. 214.

<sup>2</sup> Howery v. Helms, 20 Gratt. 1.

<sup>3</sup> Armstrong v. Huston's Heirs, 8 Ohio, 552; Bohart v. Atkinson, 14 Ohio, 236.

<sup>4</sup> Lefevre v. Laraway, 22 Barb. 175; Gallatin v. Cunningham, 8 Cow. 378; Jackson v. Woolsey, 11 Johns. 446.



of title paramount to that embraced in the partition.<sup>1</sup> Where fraud was employed in inducing the bidding, but was participated in by but one of the cotenants, it was held that the purchaser could not successfully resist an action for the purchase money. In this case, the Court reasoned as follows: "There is nothing in the answer to show that Daniel Payne, who made the false representation complained of, was in anywise the agent or representative of his cotenants in or about the sale of the land; nor is there anything in the relation of coparceners subsisting between him and his co-heirs implying an authority in him to affect their interest in the common property by any contract or representation of his. If he was alone concerned in the sale, it would hardly be questioned that the appellants, on the facts alleged, would be entitled to be relieved from the obligation of the contract; but here there are other parties interested in the contract, and in its performance by the appellants, who, it is not pretended, are at all in fault. Shall they be made to suffer loss by a fraud, in the perpetration of which they had no participation? I think not. I would not say the appellant is without remedy against Daniel Payne, who committed the fraud; but that his remedy is not the one, in the circumstances of the case, which he has invoked."<sup>2</sup> But the purchaser at a partition sale is entitled to the whole title partitioned. If, from any irregularities or defects in the suit or in the proceedings, the purchaser would not, by completing his bid and receiving his conveyance, become invested with the whole title with which the Court assumed to deal, then he will be released from his bid. Hence, if jurisdiction has not been acquired over one of the cotenants, the purchaser will be released.<sup>3</sup> The purchaser may also be released when, without any fault of his, the completion of the sale has been

<sup>1</sup> *Cashion v. Faina*, 47 Mo. 133; *Owaley v. Smith's Heirs*, 14 Mo. 153; *Schwartz v. Dryden*, 25 Mo. 574; *Evans v. Dendy*, 2 Speer, 10; *Rogers v. Horn*, 6 Rich. 362; *Sebring v. Mersereau*, 9 Cow. 344. But in South Carolina, the purchaser of a chattel at a partition sale may avoid the full payment of the price on the ground that the chattel was unsound.—*Commissioner v. Smith*, 9 Rich. 516.

<sup>2</sup> *Matlock v. Bigbee*, 34 Mo. 356.

<sup>3</sup> *Cook v. Farnam*, 21 How. Pr. 286; S. C. 34 Barb. 95; S. C. 12 Abb. Pr. 359; *Goode v. Crow*, 51 Mo. 214; *Rogers v. McLean*, 10 Abb. Pr. 306; *Clark v. Clark*, 14 Abb. Pr. 300.

so long delayed that he cannot have the benefit of his purchase substantially as if the sale had been completed without delay.<sup>1</sup> If errors and irregularities occur in the course of the proceedings, but are not of a character such as to render the sale in partition void in whole or in part, they have no prejudicial effect on the purchaser. If the parties against whose interests the errors and irregularities were committed take no steps to set aside or otherwise avoid the sale, the purchaser, by reason of their acquiescence, can acquire their title, and must therefore make good his bid.<sup>2</sup>

§ 548. **The Conveyance and its Effect.**—If neither the purchaser nor any of the cotenants show any sufficient reason for setting aside the sale, the report of the commissioners is approved, and they are directed to execute a conveyance. When the purchaser makes his payment, or otherwise complies with the terms of the sale, the commissioners execute and deliver this conveyance, and the grantee therein succeeds to all the rights of the parties to the partition. Without this conveyance, the purchaser cannot be invested with the title.<sup>3</sup> A sale in partition is a judicial sale.<sup>4</sup> The purchaser is protected by the judgments of the Court as fully as in any execution or judicial sale. The various matters necessary to authorize the sale have all been made the subjects of judicial inquiry and determination. If the Court acted erroneously in deciding upon the sale, or committed any other error, this should have been corrected by appeal or by some other appropriate proceeding in the partition suit. Not being so corrected, the parties interested have acquiesced in and ratified it; and they cannot employ it in any collateral manner to defeat the purchaser's title.<sup>5</sup>

<sup>1</sup> *Jackson v. Edwards*, 7 Pai. 412; S. C. 22 Wend. 498.

<sup>2</sup> *Noble v. Cromwell*, 27 How. Pr. 289; S. C. 26 Barb. 475; S. C. 6 Abb. Pr. 50; *Bogert v. Bogert*, 45 Barb. 121; *Rogers v. McLean*, 31 How. Pr. 279; S. C. 34 N. Y. 596; *Mead v. Mitchell*, 17 N. Y. 211; *Croghan v. Livingston*, 17 N. Y. 218; *Waring v. Waring*, 7 Abb. Pr. 472; *Dunning v. Dunning*, 37 Ill. 315.

<sup>3</sup> *Lessee of Merritt v. Horne*, 5 Ohio St. 308.

<sup>4</sup> *Hutton v. Williams*, 35 Ala. 504.

<sup>5</sup> *Goudy v. Shank*, 8 Ohio, 417; *Rogers v. Tucker*, 7 Ohio St. 427; *Stokes v. Middleton*, 4 Dutch. 32; *Lefevre v. Laraway*, 22 Barb. 167; *Pentz v. Kuester*, 41 Mo. 450.

§ 549. **Distribution of the Proceeds.**—When the sale in partition has been consummated, and the sum realized thereby is brought within the control of the Court, it is next to be divided among the various parties in interest. In making this division, the Court is often required to perform a very difficult and intricate task. The parties before the Court whose title has been divested by the sale may have a vast variety of interests. Some of them may be in possession of estates for life or for years; others may have estates in reversion or remainder; and still others may have mere contingent interests. Upon each of these interests, other claims and liens may have attached. It may happen also that some of the parties in interest are *femes covert*, infants, or lunatics, and therefore require the special protection of the Court to prevent a misapplication of their proportion of the moneys realized. The names and residences of others of the owners may be unknown, and no one may appear to claim their shares of the proceeds of the sale. In fact, the circumstances upon which the Courts are compelled to act are as infinite as the circumstances in which property may be acquired or held. The statutes of the various States whose Courts have been authorized to sell lands in suits for partition contain provisions designed to assist and control the distribution of the proceeds of the sale. In some statutes, these provisions are quite general in their terms, while in others they are much more minute. These statutes could not be copied into this work except by greatly enlarging its size without adding anything to its contents that could not as well be found elsewhere. We therefore leave the practitioner to look for them in the statutory compilations of his own State, deeming it sufficient for this work to state their general features, which are these: 1st. The costs of the suit and of the various necessary proceedings therein, including the sale, are to be paid, and the residue, after making such payment, constitutes the fund to be apportioned. 2d. The various incumbrances are ascertained, and must be paid, in the order of their priority, out of the share or shares of the person or persons against whom such incumbrances are chargeable. 3d. The Court is authorized to inquire and

determine the value of estates for life or years, and also of all future estates, whether vested or contingent, and to direct what amount shall be paid to the holders of each of such estates. 4th. The persons authorized to receive the shares of infants, lunatics, and *femes covert*, are designated. 5th. When some of the shares belong to unknown or non-resident owners, or when, from any cause, the persons entitled to such shares are not in Court, or cannot at present be ascertained, the moneys representing such shares may be invested under the order of the Court, and kept so invested until the time arrives when the Court can make a proper distribution. Where married women are parties, either as cotenants or as the wives of cotenants, the proceeds of the share in which they are interested are not usually paid to their husbands, unless the wives' consent to such payment, by some instrument executed in the same manner as instruments releasing their dower interests or conveying their separate property, are required to be executed, or unless the husbands, by some means designated by the statute, give security to indemnify the wives from loss. If the husband fails to give such security, and the wife does not consent to the money being paid to him, without security, so much of it is invested, under the direction of the Court, for the benefit of the wife, as may be deemed proportionate to her interest in the property partitioned.<sup>1</sup>

<sup>1</sup> For statutory provisions regulating the sale of property and the distribution of the proceeds, consult the statutes cited at the conclusion of section 537; and also O. P. of Cal., sec. 773 to 791; Comp. Laws Nev., secs. 1845-72; Nixon's N. J. Digest, 4th ed., p. 609-79; 3 Rev. St. N. Y., 611-20; Deady's Laws Oregon, 258-64; Thompson & Steger's St. Tenn., 3293-3306; Taylor's St. of Wis., 1684-93.



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